(26,411)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 944.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 22, 1918.

1 Court of Claims.

No. 33082.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY

vs.

THE UNITED STATES.

I. *Petition and Amended Petition.*

The claimant filed its original petition on June 28, 1915.

On July 20, 1916, the defendants filed a motion to require claimant to make its petition more definite and certain and to separately state therein its causes of action.

On December 5, 1916, this motion was argued and submitted.

On December 11, 1916, the Court filed an order allowing defendants' motion to require claimant to make petition more definite and requiring claimant to conform to Rule 17 of the Court within 60 days.

On January 26, 1917, the claimant filed its amended petition, which is as follows:

2 II. *Amended Petition and Exhibits.*

Filed Jan. 26, 1917.

To the Honorable the Chief Justice and the Associate Judges of the Court of Claims:

First Count.

Comes now your petitioner, The New York, New Haven and Hartford Railroad Company, and for cause of action alleges:

1. Your petitioner is a corporation duly organized and existing under and by virtue of the laws of the States of Connecticut,
3 Rhode Island and Massachusetts, and at the times hereinafter mentioned was and now is operating its trains on its own and leased lines through the States of New York, Connecticut, Rhode Island and Massachusetts, doing business as a common carrier of freight, passengers and express, and under the laws of the United States, especially Section 4002, Revised Statutes, and the amendments thereto, which is printed herein as Exhibit A, and the Rules and Regulations of the Post Office Department, was also as an agency of the Government of the United States, and in pursuance of certain orders issued and implied contracts entered into, at said times engaged in the transportation of the mails of the United States,

which implied contracts were created by the execution of certain distance circulars for the several routes and quadrennial periods and the subsequent notices of adjustment of pay issued by the Post Office Department. Full, true and correct copies of the distance circulars, and notices of adjustment of pay for the quadrennial period beginning July 1, 1913, and ending June 30, 1917, are hereto attached, marked Exhibits B and C, and made parts hereof. That the distance circulars and notices of adjustment of pay for the other routes and the other quadrennial periods beginning, respectively, on July 1, 1905 and 1909, are similar to the ones set out as Exhibits B and C, except as to dates, numbers and amounts, the protest of July 1, 1909, being set out as Exhibit "D."

4 2. Your petitioner further alleges that for a number of years last past it has under its obligation as an agency of the Government carried such mails of the United States as were daily deposited with it for that purpose, and has from time to time received an annual compensation fixed under the law for such a portion of said mails as had been stated by the Post Office Department as the average weight of mail per day for the subsequent quadrennial period, carried the whole length of the several postal routes on its lines as had been designated by the Department. During all these years the notice for the annual compensation had been given, extending through quadrennial periods, and the mails carried on your petitioner's lines were weighed exclusively by the Post Office Department once in four years but not oftener, and your petitioner was prohibited from fully inspecting said weighing, or from weighing said mail itself, and the daily average weight of mail thus obtained was used by the Post Office Department as the basis for stating the daily average weight of mail carried for the whole of the quadrennial period beginning a number of months after the weighing had been made. This weighing of the mails in the New England States where your petitioner's lines are wholly located was by the Post Office Department conducted for a period of one hundred and five days during the months of August, September, October, No-

5 vember and December, and was so made in the years 1904, 1908 and 1912, and the daily average weight of mail so ascertained in 1904, 1908 and 1912 was taken as the daily average weight of mail carried on each route throughout each of the four years of the quadrennial period beginning respectively on the first day of July thereafter. But your petitioner alleges that the daily average weight of mail was not ascertained by the Post Office Department for each and every year of said quadrennial period, as was by law required, and as could and should have been done, either by weighing the same annually, or by averaging the weights so taken in 1904, 1908 and 1912, respectively, between the different years of said quadrennial periods, as the Post Office Department was by law bound to do.

Your petitioner in this connection alleges that the Post Office Department deliberately and purposely so used the daily average weight of mail ascertained many months prior to the beginning of the respective quadrennial periods, for the reason that by so doing your

petitioner would be compelled to carry and did carry the whole increased and increasing amount of mail during the subsequent quadrennial period without any compensation therefor, and because if said mails had been annually weighed, or had been averaged between the weighings, your petitioner would then be paid more money than would be paid upon the quadrennial weighings.

3. Your petitioner now alleges that its annual compensation was by law fixed according to the amount of mail carried per annum, and that it was entitled to receive its compensation each year for the average amount of mail carried for that year, and that it was entirely unjust and in direct violation of the statute for the Post Office Department to pay your petitioner its compensation for a particular year based upon the daily average weight of mail carried during some other and earlier year. Your petitioner repeatedly requested and demanded of the Post Office Department that the mails carried by it be weighed annually, or that the weights taken at the beginning and at the end of each quadrennial period be averaged between the intervening years, but these requests and demands were by the Post Office Department ignored and refused, and payment was continued to be made for each year based upon the weight ascertained as of the middle of the weighing period more than eight months prior to the beginning of the subsequent quadrennial period. Your petitioner has constantly protested against this unjust and illegal method of basing its annual compensation upon a weight of mail at some other and far distant time, and these protests have been continued to the present day.

4. Your petitioner further alleges that, as is shown by the records of the Post Office Department and by the reports furnished by it to your petitioner, the total daily average weight of mail carried the whole length of each route on your petitioner's lines, as ascertained in the weighing period in the year 1908, was the sum of 259,495 pounds, and that the middle or average date of said weighing period was October 18, 1908.

That, also, as is shown by the records of the Post Office Department and by the reports furnished by it to your petitioner, the total daily average weight of mail carried the whole length of each route on your petitioner's lines, as ascertained in the weighing period in the year 1912, was the sum of 301,558 pounds, and that the middle or average date of said weighing period was October 27, 1912.

It is further shown that the annual compensation received by your petitioner for carrying the mails for the quadrennial period beginning July 1, 1909, was the sum of $536,690.53; and the annual compensation stated for your petitioner for the quadrennial period beginning July 1, 1913, is the sum of $586,036.29.

It is further shown that these amounts include no compensation whatever for carrying the increased amounts of mail for each and every year.

5. Your petitioner further alleges that the increase of mail from said 259,495 pounds, so ascertained as of October 18, 1908, to the 301,558 pounds so ascertained as of October 27, 1912, was regular, gradual and normal, caused by the growth of business and the devel-

opment of the country, and that no part of this average annual increase of mail during said quadrennial period was included
8 by the Post Office Department in the weight of mail which was furnished as the basis for the annual compensation, and your petitioner was compelled to carry and did carry the whole of this increased and increasing amount of mail without any compensation whatsoever. That the total daily average weight of mail so continuously carried by your petitioner without compensation during the six fiscal years ending June 30, 1914, is not less than 126,192 pounds, and that the transportation of the annual portion of the same at the rates now fixed by law is worth not less than $43,536.24 a year, or $261,217.44 for the whole of said period.

It is further alleged that these said amounts are due your petitioner under the law for services accepted by the Post Office Department, and that your petitioner's right to claim and collect the same has not been waived in any manner, and that the whole of said amount is due and unpaid.

6. Your petitioner further alleges that in addition to the regular, gradual and normal average increase of mail per annum, as above set forth, the Post Office Department, by virtue of the Act of Congress of August 24, 1912 (37 Stat., 557), known as the parcel post law, which took effect on January 1, 1913, required of your petitioner that it carry as mail all the packages in accordance with the provisions of said Act, and thereby greatly increased the amount of mail which was carried by your petitioner after January 1, 1913, which amounts of mail so increased by these parcel post
9 packages, were not included in any weights of mail ascertained by the Post Office Department, and no compensation whatever has been paid your petitioner for the transportation of said parcel post packages based upon any weight ascertained by the Post Office Department. That thereafter and on July 25, 1913, the Postmaster General, by an executive order, raised the weight limit of parcel post packages for transportation in the first and second zones from 11 pounds, as fixed by Congress, to 20 pounds, and on December 18, 1913, by another executive order raised the weight limit in all the zones from 11 to 20 pounds, and from 20 to 50 pounds in the first and second zones.

That since said dates the amount of mail as represented by said parcel post packages has become enormous, but the amount thereof has not been furnished to your petitioner by the Post Office Department, and hence the same can not at this time be set out herein, but these vast and increasing amounts of parcel post mail have been carried by your petitioner at an enormous expense and without any adequate compensation whatsoever. That the amount received by your petitioner for carrying the increased parcel post mail as provided in the Act of March 4, 1913 (37 Stat., 797), is the sum of $25,159.95, and no more, whereas the fair and reasonable compensation for the transportation of said parcel post mail, separate and distinct from the average annual increase above set forth, is for the two fiscal years ending June 30, 1914, not less than the

sum of $125,000.00, which total amount of $99,840.05, over and above the said amount received under the Act of March 4, 1913, though often demanded, is now due and wholly unpaid.

Second Count.

Your petitioner for a second and separate cause of action hereby reaffirms its several allegations of fact set out in the first cause of action, and makes them a part hereof so far as the same may be applicable, and further alleges that since the rate of pay per mile per annum for the transportation of the mails was fixed by law in the year 1873, it has from time to time been decreased by various and different acts of Congress, the last being the Act of March 2, 1907, whereby the compensation on routes carrying more than 5,000 pounds was reduced five per cent and the compensation for railway post office cars was reduced in various sums, which reductions were by the Postmaster General applied in the case of your petitioner to the compensation for the fiscal years ending June 30, 1908, and June 30, 1909, as well as for succeeding years, thus reducing the compensation of your petitioner for each of said years so ending June 30, 1908 and 1909, for transportation in the sum of $33,997.49 and for railway post office cars in the sum of $22,876.11. Your petitioner now alleges that at the time of the enactment of said statute on March 2, 1907, the total compensation paid your petitioner for the transportation of the mails was insufficient to pay the cost thereof or any profit thereon, and said reductions only increased the amount of said deficiency.

Your petitioner further alleges that by the beginning of the fiscal year on July 1, 1907, the cost of labor, materials, depreciation charges, betterments, maintenance, taxes and operation had largely increased and since said date has more rapidly advanced, yet notwithstanding the decreased compensation and the increased cost of equipment and operation, the demands and requirements of the Post Office Department have from time to time been made more exacting, rigid and arbitrary, making necessary largely increased expenditures on the part of the several carriers and of your petitioner, and a far more costly service in the transportation of the mails.

In this connection it is further alleged that the Postmaster General has from time to time made exorbitant demands for a more extensive use of terminal facilities and switching conveniences, and in an elaborate and troublesome side service; he has pretended to exercise an arbitrary, discriminating, and unfounded discretion constantly against the legal rights and interests of the carriers; he has from time to time during the existence of outstanding quadrennial orders made large additions thereto and increased requirements therein; he has refused to pay the statutory rate for carrying the mails during quadrennial periods stated by him; he has at various times ordered apartment and railway post office cars of special construction, design, and equipment, and issued orders for their use for definite periods, and then refused to pay the

rates stated in the orders, but offered lower and different rates which were unremunerative and confiscatory; he has made greater and more expensive demands as to rooms in stations for handling the mails; he has made many and extensive demands in the handling and the disposition of the mails at the several stations along the lines of the railroad, and in the transportation of the mails between the stations and the post offices not more than 80 rods therefrom; he has required the hauling of vast amounts of gold coin as mail of the fourth class in violation of law and without compensation to the carriers; he has required the carrying of mail on limited trains, and has burdened the service with onerous fines, forfeitures and increasing exactions; all of which innovations and requirements have vastly increased the cost of the mail service and the expenditures made necessary by the carriers, and by your petitioner in the transportation of the mails on its lines, but for all of which no increased compensation has been given or offered, and for which no adequate compensation has been paid.

In addition to these costly demands and expensive requirements by the Postmaster Genera[1] Congress by the Act of August 24, 1912 (37 Stat., 557), known as the parcel post law, which took
13 effect on January 1, 1913, increased the weight limit of fourth class mail matter from 4 pounds to 11 pounds and thereby vastly increased the amount of mail to be carried, and required changes in and additions to the equipment for transportation; that thereafter and on July 25, 1913, the Postmaster General by an executive order, and without any warrant or authority in law, raised the weight limit of parcel post packages from 11 to 20 pounds in the first and second zones, and on December 18, 1913, by a similar and unauthorized executive order raised the weight limit in all other zones from 11 to 20 pounds, and from 20 to 50 pounds in the first and second zones, and thereby invited and permitted the shipping of vast quantities of merchandise, farm, mine and factory products, and material of all kinds which theretofore had been shipped by freight or express, all without any adequate compensation therefor. The size, weight limit, and conditions for shipment of said parcel post packages are such that the cost of the additional equipment and operation in the transportation of the mails have thereby been vastly increased.

Your petitioner therefore alleges that by reason of the premises above set forth, by reason of the reduction of the pay for transportation and for railway post office car service made effective during the fiscal year beginning July 1, 1907, and also by reason of the increased cost of equipment and operation in the transportation of the mails, the compensation therefor has now become and
14 has been since July 1, 1907, entirely inadequate to compensate your petitioner for the said service under the present conditions, and such compensation has since July 1, 1907, become and now is, unreasonable, unjust, unremunerative and confiscatory, and does not repay your petitioner for the cost of transportation of the mails or any profit thereon. That by reason of these premises

the present rate of pay per mile per annum is unconstitutional and void, and to that extent the private property of your petitioner has been taken for public use without just compensation, and your petitioner is entitled to recover the fair and reasonable value of said services. That ever since the first day of July, 1907, said rate of pay has been unreasonable, unjust, unremunerative, confiscatory and unconstitutional, to an amount of not less than $728,000 per annum, and that the defendants are indebted to your petitioner in this second cause of action because of said deductions in the fiscal years ending June 30, 1908 and 1909, respectively, in the sum of $113,747.20; and also for the value of said services over and above the amounts received thereon for the six fiscal years ending June 30, 1909, 1910, 1911, 1912, 1913 and 1914, respectively, in the further sum of $4,368,000, making a total sum of the second cause of action of $4,424,873.60, all of which, though often demanded, is due and wholly unpaid. Your petitioner has made no assignment
15 or transfer of said claim or of any part thereof or interest therein.

Wherefore, Your petitioner prays judgment against the United States in the sum of $4,524,713.65.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
By EDWARD G. BUCKLAND,
Its Vice-President.

DISTRICT OF COLUMBIA, *ss.:*

Edward G. Buckland, being first duly sworn, deposes and says that he is one of the Vice-Presidents and the General Counsel of the New York, New Haven and Hartford Railroad Company, the claimant above named; that he has read the foregoing petition and knows the contents thereof, and that the facts therein stated are true as he verily believes.

EDWARD G. BUCKLAND.

Subscribed and sworn to before me this 12th day of January, 1917.

[SEAL.] EDMUND BRADY,
Notary Public, D. C.

S. S. ASHBAUGH,
Attorney for Claimant.
EDWARD G. BUCKLAND,
General Counsel.

16 EXHIBIT A.

§4002, Revised Statutes.

Second. That the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an

average weight of mails per day of two hundred pounds, fifty dollars (now $42.75); * * * the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty (now ninety) at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct.

EXHIBIT B.

Division of Railway Adjustments.

Number of Route, —.

Post Office Department.

Second Assistant Postmaster General.

Washington.

Read carefully.

Please have this Railroad Distance Circular carefully and properly filled, in accordance with the following instructions, and returned to this office as soon as possible.

In column 1 state the distance from station to next station, junction, or point where mails are put on or off trains.

In column 2 state the names of all railroad stations, junctions, and points where mails are put on or off trains, in the order in which they are reached on outward trips, and designate the stations where your company has no agent or other employee by an asterisk (*).

In column 3 state the name of each post office or postal station which receives mail directly from this route; the same to be opposite the name of the point from which it is supplied, if possible.

In column 4 state the distance by the shortest route open to and used by the public in traveling between the nearest door of the baggage room and the nearest door of the post-office building where the receipt and delivery of mail is practicable.

17 In column 5 state the distance between the post office or postal station and the point on the railroad track nearest to such post office or postal station.

State fractions of a mile in hundredths. This is important.

If trains on any part of this route be operated over the tracks of another railroad company, or if they be operated over the tracks of your own company over which another railroad mail route has been authorized, state the points between which such trains are so operated and whether the tracks used are tracks of another company or of your own company, using for that purpose the blank spaces on this form provided therefor.

If there be any spur tracks from the main line of this route, show

location and state the length of such spur tracks, separately. A "spur" is understood to be a short track, not a branch line.

Have the statement verified by the Chief Engineer or other competent officer of the road, the acceptance on second page signed by the President or Manager of the company, and the seal of the company impressed on the circular. With the distance circular send two copies of latest working schedule showing the trains operated over this route.

Failure to return this circular promptly may cause corresponding delay in adjusting compensation on the route.

____ ____,

Second Assistant Postmaster General.

The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service.

____ ____,

President or General Manager.

Impress seal here.

I hereby certify that the statement of distances contained herein is correct.

__ __ ____,

Chief Engineer.

18 The Company named below agrees to accept and perform mail service upon the conditions now prescribed by law and the existing regulations of the department, but only because its failure to perform this service would result in an intolerable hardship to the territory which it serves; otherwise, the company would decline to perform such service because of the burden of loss, admitted by the Post Office Department, which such service compels it to bear.

It protests that the pay for such service is inadequate and unreasonably low, and that while according to judicial decision it is not by law compelled to perform the service, nevertheless, it is in fact so compelled. It reserves the right to claim and recover a reasonable compensation for any additional service which it may agree to perform.

This agreement, and acceptance is upon the further condition that this company does not recognize as valid or binding, Postmaster General's Order No. 165, dated March 2, 1907, or said Order as amended by Postmaster General's Order No. 412, dated June 7, 1907.

This company can not accept as full compensation for services rendered, the amount fixed according to the method of computation of average weight prescribed by such order. It reserves the right to insist upon payment according to the method of computing the average weight applied by the Department prior to the issuance of Order No. 165, issued by the Postmaster General, March 2, 1907.

This company reserves the right to terminate this acceptance and

to withdraw from the performance of service upon not less than three months' written notice to the Post Office Department.

This company also reserves the right to refuse to stop express trains for the purpose of receiving or discharging parcel post or other mail which is too heavy or bulky to be thrown off or received from mail cranes while the train is in motion.

19 Care should be exercised to state the title of the company actually operating the railroad, in the blank space below, as the company therein named will be accepted as being entitled to the compensation for the service, and to prevent any misunderstanding as to title the seal of the company should be impressed.

Title: ..... Rail.... Co., State of..... Route No.....
from..... to..... Lap Service: From..... to.....
over tracks of..... Rail..... Co., from..... to.....
over tracks of..... Rail..... Co., from..... to.....
over tracks of..... Rail..... Co.

1. Distance from Station to next Station, Junction, or point where mails are put on or off trains. Miles..... 100ths of a mile.....

2. List of stations, junctions, or points where mails are put on or off trains. Designate Stations where the Company has no agent or other representative thus: *

3. Official name of Post Office or Postal Station receiving or forwarding mail by this route.

4. Distance from Station to Post Office or Postal Station. Miles ..... 100ths of a mile.....

5. Distance from Post Office or Postal Station to nearest point on Railroad Track. Miles..... 100ths of a mile.....

20 EXHIBIT C.

Notice to Company of Adjustment of Pay.

Post Office Department.

Second Assistant Postmaster General.

Washington, November 13, 1913.

Mr. B. Campbell, Vice President, New York, New Haven & Hartford R. R. Co., New Haven, Conn.

SIR: The compensation for the transportation of mails, etc., on Route No. 106,004, between New York, N. Y., and Boston, Mass., has been fixed from July 1, 1913, to June 30th, 1917 (unless otherwise ordered), under acts of March 3, 1873, July 12, 1876, June 17, 1878, March 3, 1905, March 2, 1907, and May 12, 1910, upon returns showing the amount and character of the service for a number of successive working days, not less than ninety, commencing September 4, 1912, at the rate of $344,231.42 per annum, being $1,502.21 per mile for 229.15 miles; and for R. P. O. car service at the rate of $90,007.65 per annum, being $585.00 per mile for 73.93

miles, New York, N. Y., and Cedar Hill (no) Conn., for 10 lines of 60-ft., 2 lines 50-ft., and 3 lines 55-ft., cars; $300.00 per mile for 145.59 miles, Cedar Hill (no) and Readville, Mass., for 6 lines and one half line of 60-ft., and one line of 55-ft., cars; $320.00 per mile for 9.63 miles, Readville and Boston, Mass., for 7 lines of 60-ft., and 1 line of 55-ft. cars.

This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week.

Attention is called to my letter of June 30, 1913, with reference to the application of order N. 412 of the Postmaster General, and to the fact that the amount of compensation for the transportation of the mails herein stated is fixed after making such application, and you are again informed that this is all the compensation that will be paid for such service on the route named.

Respectfully,

(Signed) JOSEPH STEWART,
Second Assistant Postmaster General.

2508.

21 EXHIBIT "D" TO THE PETITION.

Allowed to Be Filed in Open Court Nov. 5, 1917.

Correspondence Between the New York, New Haven and Hartford Railroad Co. and the Post Office Department Regarding the Carriage of Mail.

22 The New York, New Haven and Hartford Railroad Company.

President's Office.

New Haven, Conn., May 13, 1909.

Hon. Frank H. Hitchcock, Postmaster General, Washington, D. C.

DEAR SIR: This company is in receipt of requests from the Second Assistant Postmaster General for the signature of its proper officer to distance circulars, agreeing to carry United States mails beginning July 1st, 1909, over the mail routes included within its system. It is the desire of this company to carry the United States mails over all of said routes, but that it may be fairly compensated therefor by a reasonable profit over and above its operating expenses and fixed charges. It ought not, however, be required to perform this service either at cost or at a loss. A careful investigation has recently been made by this company to determine the cost of carrying the mail upon said routes. As a result of said investigation, covering the fiscal year ending June 30th, 1907, it appears that said service was performed at a loss of more than $200,000. for said fiscal year. Since that time and against the protest of this company, its pay has been withheld under the claimed authority of the Act of March 2nd, 1907.

The mail was weighed during September, October, November and December, 1908, which was the period of the severest financial depression; the weights were determined according to P. M. G. Order 412; all of which will still further reduce this company's pay by over $150,000. The total annual loss to the company which would follow the signing of the distance circulars submitted would be upward of $350,000. To put it more concretely, the Government is asking this company to accept for four years less than $650,000. per year for performing service which costs it over $1,000,000. per year, making an aggregate loss of $1,400,000. for the four years beginning July 1st, 1909.

23 The Act of March 3rd, 1905, requires that for the purpose of determining how much shall be paid to a railroad company, the mail shall be weighed not less than once every four years. The Post Office Department has adopted that construction of this law which is most economical for the Government but most injurious to our company. In our territory the weight of mail normally increases about five per cent. each year, or about twenty per cent. during the four years, and yet the department asks us to contract for four years to carry the mail for the pay fixed during the year preceding the beginning of the contract and when the weight of mail is less. In other words, it asks us to carry from one hundred and five to one hundred and twenty per cent. of mail for a price fixed for one hundred per cent. of mail. In our particular case this discrepancy is emphasized by the fact before stated, that the last weighing occurred in the Fall and Winter of 1908 when Southern New England was suffering most keenly from the panic and the business depression which preceded and followed it. During that period most of our mills and factories closed or greatly decreased their output and our other industries were correspondingly curtailed. The result of the weighing, therefore, showed a decrease even as compared with the weighing of 1904, whereas there was an undoubted increase, excepting during the period when the weighing occurred. Since then business has again resumed almost its normal volume. The four years beginning 1909 will, in all probability, witness at least the usual increase of five per cent. per annum so that in 1913 our company will be carrying an increase of at least forty per cent. over the weights of 1904, and much more than the abnormally low weight of 1908.

We submit that the department should either weigh the mails annually, or average the weights during the four years so as to more nearly correspond to the actual weight carried.

The distance circulars referred to contain the following statement:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service.

____ ____,

President or General Manager."

This circular is construed by the Post Office Dept. to be an
24 offer which, when accepted, becomes binding upon the company for the ensuing four years. The Department construes this a contract to authorize Congress to reduce the compensation during said four years without the consent of the railroad company; also to authorize the Department to make such regulations as will, without the consent of the company, and even against its protest, impose additional service involving an increased cost to the company without any corresponding compensation.

After the passage of the Act of March 2nd, 1907, reducing compensation for carrying the mail, this company protested against the reduction as being without its consent, and was met by the statement from the Second Assistant Postmaster General that the existing contracts contemplated the possibility of such reduction, and that in any event the Post Office Department was not authorized to pay any higher compensation than that authorized by Congress, and that, therefore, the reduced rate fixed by said Act of March 2nd, 1907, must continue to apply. This company answered, stating that Congress was without power to reduce compensation once fixed by contract unless the contract so contemplated; that the contracts evidenced by the distance circulars did not contemplate any reduction during the four years required for their performance, and this company then protested against the reduction, and reserved the right to establish its claim before the Court of Claims or other proper tribunal. Applying this statement of the Post Office Department to the contracts which it asks this company to enter into, beginning July 1st, 1909, dictates the wisdom of making every such contract so explicit as to leave no doubtful phrases upon which the department may put a different construction from that understood by this company.

From the Federal Statutes governing the carriage of the mails and fixing the authority of the Postmaster General in respect thereto, it appears that when a contract of any sort is entered into by a railroad to carry the mails, the following duties are imposed upon it:

R. S. 4002: "That the mails shall be conveyed with due frequency and speed; and that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails."

25 There appears to be no other mandatory expression in the statutes. It is true that Sec. 4000 and the Act of July 5th, 1884, provide that a railway company carrying mail shall carry on any trai nwhich may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same. If any railroad shall fail or refuse to transport the mails, when required by the Post Office Department, upon the fastest train or trains run upon said road, said company shall have its pay reduced fifty per centum of the amount provided by law. It will be observed, however, that R. S. 4000 and the Act of July 5th, 1884, impose the duties therein stated only when directed by the Postmaster General, and there is nothing in the statute con-

trolling his discretion in giving such direction. All of the other provisions of the statutes merely authorize the Postmaster General to make regulations, but do not command him to do so. I refer to R. S. 4004; Act of March 3rd, 1879; R. S. 3975; Act of March 3rd, 1887; the Postal Laws and Regulations applying to railway mail carriage to wit: Secs. 1164, 1179, 1184, 1186, 1191, 1192, 1194-1197, 1198 and 1200 are not laws but only orders which the Postmaster General has issued from time to time. It therefore appears that the only duties which a railroad Company must agree to perform, and the only terms which the Post Office Department must insist upon, as a condition precedent to entering into any contract for the carriage of the mails, are those set forth in R. S. 4002, for the performance of which the Postmaster General is authorized to pay the compensation prescribed and appropriated by Congress.

It will be observed that R. S. 4002 requires a railroad to convey mails with,

1. Due frequency,
2. Due speed,
3. Provide sufficient and suitable room, fixtures and furniture, in a car or apartment properly lighted and warmed, for route agents to accompany and distribute the mails.

Nothing herein requires the railroad company to carry said route agents free of charge.

Other regulations made by the Postmaster General and not
26 required by law, impose additional burdens upon this company. Among them are the following:

1. Regulation requiring railroads to transport mails to and from terminal post-offices.

2. Regulation requiring railroads to transport mails to and from intermediate post-offices within eighty rods of station where railroad has a representative.

3. Regulation requiring railroads to transport mail between railroad stations at connecting points where stations are not over eighty rods apart.

4. Regulation requiring railroads to take charge of mails where trains are late, or where the schedule arriving or leaving time of the train is late at night.

5. Regulation requiring railroads to place cars at points accessible to mail messengers or contractors for wagon service. If cars are not so placed railroad must transport mail to and from points which are accessible.

6. Regulation requiring mail cranes to be furnished by railroads at points where trains do not stop. Reduction of speed or stopping of trains at such points.

7. Regulation requiring railroads to convey without any charge, mails bags, post-office blanks, stationery, supplies, and all duly credited agents of the Post Office Department, and Post Office Inspectors upon exhibition of their credentials.

8. Regulations requiring rooms to be provided in stations for handling the mails, where transfer clerks are employed.

9. Regulation denying full compensation for R. P. O. cars unless the full capacity is required for a round trip.

All of the foregoing regulations are imposed by the Postmaster General and therefore may be revoked by him. He may revoke any or all of them with respect to any railroad company when losing money on account of them, and yet enforce them with respect to any railroad which is making money in spite of them.

This company does not contend that any of these regulations are unnecessary, but respectfully asks that for the performance of service imposed by the Post Office Department it shall receive reasonable compensation. It insists that the Postmaster General should
27 not in fairness ask to have this service performed except upon the payment of a fair compensation; that the Government ought to be willing to pay its way the same as any other shipper.

This company recognizes that there rests upon it a high obligation to perform its duties as a common carrier in Southern New England, and this obligation is the greater because there are no means of speedy transportation excepting over lines owned, operated or controlled by it. It cannot refuse to carry the mail, or demand exorbitant compensation or stipulate for unreasonable conditions, without it be properly censured by the people whom it serves. It, therefore, desires at this time, before the beginning of the new four year period on July 1st, 1909, to state to you some of the reasons why it should not accept the conditions imposed by the department by signing said distance circulars which are construed by the department as assenting by it to the carrying of the mail at a continuing loss.

Yours truly,

C. S. MELLEN, *President.*

Post Office Department.

Second Assistant Postmaster General.

Washington.

June 29, 1909.

Mr. C. S. Mellen, President, New York, New Haven and Hartford Railroad, New Haven, Connecticut.

SIR: Your letter of May 13, 1909, addressed to the Postmaster General, with regard to my request for the signature of an executive officer of your company to the distance circulars for the new term beginning July 1st, 1909, has been referred to me for reply. Mr. Campbell's letter of May 21, 1909, addressed to me, with reference to the same subject, has also been received.

It is noted that you state that your company desires to carry the mails over all its routes but that it wishes to be fairly com-
28 pensated therefor by a reasonable profit over and above its operating expenses and fixed charges; that it should not be required to perform the service either at cost or at a loss, and that an investigation has recently been made by your company to determine

the cost of the service, from which it appears that it was performed during the fiscal year ended June 30, 1907, at a loss of more than $200,000.

The question of the adequacy of railroad mail transportation pay has from time to time been officially investigated by commissions and there is no finding of which I am familiar to the effect that companies are performing the service at a loss. I am not informed as to the method by which the result you mention was reached, as your computations or figures have not been submitted to the Department, nor, so far as I know, to Congress, which fixes the rates for this service.

I have carefully examined your letter and, if I understand it correctly, it assumes the position that the company should be paid a sum in excess of the statutory rates for the performance of service required by certain regulations to which you refer, the requirements of which are not specifically set out in Revised Statutes, Section 4002; and that incidentally you think the Department should weigh the mails annually instead of quadrennially, and that Congress has no power to reduce the rate of compensation which has once been fixed by the orders of the Department.

I shall refer to the last two suggestions first. The law leaves to the discretion of the Postmaster General the frequency with which he may weigh the mails, providing, however, it shall not be less than once in every four years. The quadrennial weighing was determined upon after the passage of the Act of 1873 as being fair, and it has been believed that the compensation fixed upon such a weighing adequately covers the increase in the weights during the term. These weighings have occurred each four years upon estimates submitted to Congress for the same, and annual weighings could not be ordered without the necessary cost being submitted to and appropriated for by Congress. In this connection I have to remind you that for two years past there has been a proposal before Congress to specifically authorize annual weighings, and each time Con-
29 gress has declined the proposition upon the ground that it would result in paying the railroad companies more money than would be paid upon the quadrennial weighings. It is apparent, therefore, that if the Department desired to inaugurate annual weighings the action of Congress would be necessary either by appropriations to cover the cost, or by specific authorization.

With reference to your statement in regard to the weights taken in 1908 which are to become the basis of payment for the new term beginning July 1, 1909, I have to suggest that such decreases as may have occurred should be regarded as mere incidents of an extended service, applicable alike to all the railroads in the country as a whole. I think it but fair to assume that the operation of any system of adjustment upon weights taken at stated periods must be subject to such variations in the commercial conditions of the country, and that decreases which may occur at one time will be amply offset and compensated for by increases occurring at another time.

With reference to your comments regarding the power of Congress to reduce compensation after the rates to be paid have been fixed

by the orders of the Department, I have to advise you that the position which the Department holds in this respect is that which has been maintained by it at all times since the passage of the law of 1873 and has been sustained by both the Court of Claims and the Supreme Court of the United States. This position, briefly, is that the arrangement into which the Department enters with the railroad company is not a contract for a fixed and invariable amount of compensation for a period of four years but is subject to future orders, and may be changed during the term. If Congress reduces the rates during the term and directs the Postmaster General to readjust the compensation accordingly, it is his duty to do so. It is evident, therefore, that the position which this office assumes with reference to that question is not a new one but is that which has been maintained at all times and sustained by the courts.

With reference to your contention for a higher rate of pay upon the theory, as I gather from your letter that certain requirements asked of the company are not specified in the law, I have to suggest, first, that Congress has fixed the maximum rate of compensation which can be paid for this service and the Postmaster General has no power to fix or to pay a higher rate; and second, that the requirements of the law are not so limited as you infer. As I understand it, there is no attempt in the statute to set forth in detail the requirements for railroad transportation. Certain specific conditions are made pre-requisite to the earning of full pay, as, for instance, the carriage of the mails with due frequency and speed, the furnishing of sufficient and suitable rooms, and the carriage of persons in charge of the mails, etc. The statute does not assume to define what due frequency or due speed is, or what space is sufficient and suitable for the purposes of railway post-offices, but leaves all these things to the Postmaster General to be fixed by regulation or instructions. The detailed and specific requirements of the service are set forth now, as from time immemorial, by regulations of the Postmaster General, which have all the force and effect of law and which are contemplated by the general statutes authorizing the transportation of mails by railroads. These regulations are promulgated by the Postmaster General under the authority of Revised Statutes, Section 161, and such regulations, when not inconsistent with law, have been universally held by the courts to have all the force and effect of law. When Revised Statutes, Section 4002, was passed a number of the regulations referred to were in force and they, together with others which are found necessary for the conduct of a good service as contemplated by the statutes, become a part of the contract between the Department and the companies. As an example of this, I beg to remind you that the requirement of companies to perform side service at certain intermediate post-offices has been held by the courts to have been fairly contemplated by the statute fixing rates of pay.

I notice you state that the regulations require railroad companies to convey, without any charge, mail bags, post-office blanks, stationery and supplies. This is incorrect, as all such matters are duly weighed and paid for the same as any mail matter.

I am unable, therefore, to agree with your conclusion that these

regulations may be waived or revoked at pleasure, enforced with respect to one class of railroad companies and disregarded with reference to others. They are all essential parts of a good administration and are uniformly required of all companies as parts of the general service for which Congress has fixed uniform rates.

31 I note with satisfaction your statements regarding the high obligation you recognize to perform the mail service over your road and the expression of your purpose to continue the service. I regret exceedingly, however, that you have felt that you should not accept the conditions imposed by the Department by signing the distance circulars. In this regard, however, I am compelled to advise you that the Department will not enter into any contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation, and it must be understood that, in the performance of service your company will be subject, as in the past, to all the postal laws and regulations which are now or may become applicable during such service, and that for service no greater compensation can be paid than that provided by the statute and regulations and fixed by the orders of the Postmaster General.

Since the passage of the law of 1873, under which the present practice of submitting distance circulars as a basis for the new term was inaugurated, no company has declined to sign and return the same for the new term, so far as I am informed, although during the last two years some have sought to modify the agreement clause. The filing of the distance circular, properly signed, has always been the basis upon which computation has been made and the pay order issued, and I trust you will have those sent to your company signed and returned as early as possible, in order that the compensation may be fixed promptly and the warrants issued for service without delay.

Very respectfully,

JOSEPH STEWART,
Second Assistant Postmaster General.

32 The New York, New Haven and Hartford Railroad Company.

President's Office.

New Haven, Conn., July 8, 1909.

Hon. Joseph Stewart, Second Assistant Postmaster General, Washington, D. C.

DEAR SIR: I beg to acknowledge the receipt of yours of June 29th, in answer to mine of May 13th, 1909, addressed to the Postmaster General.

Permit me to point out that you are in error when you say that you have not been informed as to the methods by which this Company reached the result that it has been carrying the mails at loss. On January 18th, 1908, Mr. E. G. Buckland, a Vice-President of this Company, in a personal interview with Postmaster General

Meyer, stated that this Company was carrying the mails at a loss. On September 11th, 1908, in response to a request made of Mr. Buckland he sent to Mr. J. W. Hollyday, Acting Second Assistant Postmaster General, a letter stating in detail the methods whereby this Company ascertained the cost of carrying the mail. In a subsequent conversation with Mr. Buckland you stated that the aforesaid method was substantially the correct one, and like that which the Department had in mind to make the basis of an inquiry to determine the cost of carrying the mail. Prior to that time, and on May 6th, 1908, Mr. B. Campbell, a Vice-President of this Company, wrote to your predecessor, the Hon. James T. McCleary, stating that previous to the passage of the Act of March 2nd, 1907, the cost of carrying the mails exceeded the amount of pay received by this Company from the Government, and that the attempted reduction under said act would result in a further loss. The Post Office Department made no attempt to contradict this statement, or indeed to investigate and determine the accuracy of it. Nor did it avail itself of the opportunity at the last session of Congress to present to the Committee on Post Offices and Post Roads of either House the statements of this Company, nor did it in any other way endeavor to find out whether the Company was being fairly paid for the work which it
33 performed.

I am advised that this Company being a common carrier, may not refuse to accept and carry any proper commodity when paid or tendered a reasonable compensation for such carriage, and that this applies to United States mail, but I am also advised that it is not bound to carry the United States mail or any other commodity at a loss or indeed at any price less than a reasonable profit over and above its operating expenses and fixed charges.

Your letter proceeds upon the theory that after Congress has determined what service shall be performed and has offered to pay a certain price for the performance thereof that the Postmaster General, under the authority of R. S. 161, has the right to add to the requirements which Congress has enacted, make his regulations to have all the effect of law, and enforce the same upon a carrier against that carrier's will; that if any carrier enters into any contract with the Government for the carriage of the mail, it must thereby subject itself not only to perform the things stipulated in that contract, but any other obligations which the Postmaster General may in his discretion see fit to impose; that after the Postmaster General has imposed the same he shall be the sole judge to determine whether the conditions are fulfilled, thus giving him the power to add to our burdens and become prosecutor, judge and jury in compelling us to bear them. I venture to say that such a proposition is unheard of in the business world.

Referring specifically to the statements made in your letter. You say that the law leaves to the discretion of the Postmaster General the frequency with which he may weigh the mails; that the quadrennial weighing was determined after the passage of the Act of 1873 as being fair. This determination apparently was arrived at

only by the Postmaster General without consultation with the railroad companies, and he has insisted upon it ever since. The fact that Congress has not appropriated money to provide for the annual weighing would dictate the wisdom of arriving in some businesslike way at an average yearly increase in the weight of mails in order that the expense of the annual weighing might thus be avoided.

The fact that our weight of mails was taken during a period of serious financial depression is met by you with the statement that the same is a mere incident of an extended service. That fact, however, will not prevent our Company from losing something
34 like $1,400,000.00 in the next four years if it carries the mail at the rate determined upon by the last weighing. I submit that it will not do to answer a specific complaint by a general statement, particularly in view of the fact that neither for the ensuing four years, nor for the four years last passed has this Company received as much for carrying the mails as it has cost it to carry them.

With reference to your statement that Congress has the power to reduce compensation after the rates have been fixed by your Department, I am advised that the Supreme Court did not so hold, but that it did hold as follows:

Eastern Railroad Co., v. United States, 129 U. S., 391:

"It cannot be said that the reduction of five per cent. was a violation of that contract; for, according to its terms, the parties agreed that the rates fixed at the latter date were subject to such future orders as the Postmaster General might make. We do not mean that the railroad company was bound to continue the carrying of the mails, if subsequent changes in the rates were unreasonable or did not meet with its assent. On the contrary, it was at liberty, when the five per cent. reduction was made, to discontinue their transportation on its cars.

Chief Justice Richardson, speaking for the Court of Claims, properly said that the order for the reduction under the Act of 1878, and the notice thereof to the company, 'constituted an offer on the part of the Postmaster General which the claimant might decline or accept at his pleasure.' Having received the reduced compensation without protest or objection, it may be justly held to have accepted that offer."

And the same court held to the same effect in the case of Chicago & Northwestern Railroad Company v. United States, 104 U. S., 680. If then, to use the words of the Supreme Court, a railroad company is not "Bound to continue the carrying of the mails, if subsequent changes in the rates" are unreasonable and do not meet with its assent, even though it has made a contract with the Department much more is it not so bound when it has refused, as this Company has refused, to sign your distance circulars and enter into
35 any such contract. I am advised that there is no subsequent decision of the Supreme Court overruling or modifying the foregoing decision.

I must again insist that there is nothing controlling the action

of the Postmaster General in any statute other than that of Section 4002. If he in his discretion requires additional service by his regulations or in any other way, the Government which he represents must be prepared to pay a reasonable price for the same. The fact that in the performance of these regulations a railroad company is losing money would seem to be a reason why the regulations should be revoked rather than why it should be met with the statement that Congress has not authorized payment for the service which the Department insists upon.

Referring to the example which you cite regarding the transportation of mails between stations and post-offices, I invite your attention to the words of the decision to which you doubtless refer, as contained in your Digest of Decisions affecting the Post Office Department and Postal Service, for 1905:

"A well estab*il*shed practice, such as railroads receiving and delivering mail matter at all offices within 80 rods of the road without charge, must be deemed to have been considered by Congress, and the Department, when fixing the rate of compensation for railroad mail transportation, and performing that service without objection in accordance with the established practice, will preclude the road from receiving additional pay therefor."

That decision does not mean, and was not intended to mean, that when such service is specifically and distinctly objected to because not forming a part of the contract it will still be considered within the implication of the contract.

The statement of the Company which you note with satisfaction regarding its high obligation to perform its duties as a common carrier in southern New England is not as you suppose coupled with an expression of its purpose to continue the service. I stated in my letter of May 13th that this Company cannot refuse to carry the mail, or demand exorbitant compensation or stipulate for unreasonable conditions without being properly censured by the people whom it serves, but there was nothing therein which can be construed
36 into an expression of a determination to continue carrying for the Government at an annually increasing loss. It is true that this Company owes a high civic obligation to the people of Southern New England, but it also owes an obligation to the more than 15,000 stockholders whom its officers represent, many of whom are in a large measure dependent upon their dividends for their support. I cannot see my way clear to undertaking to carry for the Government at an unauthorized and unnecessary sacrifice of our stockholders' incomes, and my feeling in this respect is emphasized by the fact that no one representing the Post Office Department has at any time endeavored to present to Congress the facts as I have herein stated them to you, although officers of the Department have been frequently advised of the situation.

In order, therefore, that there may be no misapprehension as to the intention of this Company I give you notice that if mail is tendered to this Company for carriage the services required by the Postmaster General under the regulations which he has the power to

revoke will not be performed as a part of the service for which Congress has appropriated compensation, and I further give you notice that no officer or employee of this Company has by accepting the mail any authority to recede from or in any other way modify the position of this Company as herein stated.

This Company is now willing to carry the mail and to perform any service in relation thereto for a price which may by a competent tribunal be determined to be a reasonable one for the services contemplated, but it absolutely declines to enter into any contract which shall give the Postmaster General, or anyone representing him, the right to impose at his pleasure additional burdens and leaving the Company without recourse or remedy be sole judge as to whether the contract is properly performed.

Yours truly,

C. S. MELLEN, *President.*

37

Post Office Department.

Second Assistant Postmaster General.

Washington.

28th July, 1909.

Mr. C. S. Mellen, President, New York, New Haven & Hartford Railroad Company, New Haven, Connecticut.

My Dear Sir: Your letter of the 8th instant, in reply to mine of June 29, has been received and carefully noted.

In your statement regarding your claim of having submitted to this office the methods by which your company reached the results claimed with reference to the cost of carrying the mails, you apparently overlooked my full statement to which yours is intended as a reply. My statement was that I am not informed as to the method by which the results you mention were reached "as your computations or figures have not been submitted to the Department." The letter of your Vice-President, Mr. E. G. Buckland, of September 11, 1908, to which you refer, merely shows, in a general way, the method followed by your accountants in apportioning expenses. It is not accompanied by any computations, figures or results, nor have any such ever been filed in the Department. It was submitted, in response to a letter from the Second Assistant Postmaster General, stating that at a recent conference in this office the statement had been made that your company had caused an estimate to be made of the expenses of conducting the service on your lines and that the office would be pleased to receive from you a statement as to the manner in which the apportionment of operating expenses was made, and, further, that the information was desired for consideration in connection with the purpose of this office to prepare suitable inquiries and instructions for securing from companies the cost of operating and conducting the mail service. The letter does not place the Department in possession of any information which could

be acted upon with reference to the results it is claimed your accountants arrived at, and was asked for and submitted only in connection with the preparation of the inquiries above mentioned.

I do not recall what was said in the conversation with Mr.
38 Buckland to which you refer, but if I said anything with reference to the letter it could only have been that it was entirely satisfactory as a response to our inquiry. Mr. Buckland no doubt misunderstood it if he gained any other impression. It is not like that which the Department has had in mind to make the basis of an inquiry; in fact, differs very materially from the plan recommended by the committee to which the subject was referred.

In reply, therefore, to your assertion that the Department has made no attempt to contradict your statement or to investigate and determine its accuracy or to avail itself of the opportunity at the last session of Congress to present to the Committees on Post Office and Post Roads the statement of your company, I have to remind you that your company has never yet filed with the Department the statement showing the alleged loss or put us in possession of any details which could be the subject of verification, or of transmission to the Congress. Upon the other hand, I have to invite your attention to the letter of the Second Assistant Postmaster General, of May 16, 1908, addressed to your Vice-President, Mr. Campbell, in which he said:

"In regard to your statement as to the cost of performing the service, I have to advise you that if it is your opinion that the compensation is inadequate for the service rendered, the question is one which should be submitted to Congress by you as that body fixes the maximum rates which may be allowed by the Postmaster General."

I am not advised that your company has ever taken these steps. I shall be pleased to have you file your statement with the Department if you see fit to do so, and will make such examination of it as is practicable and forward the same to Congress if it is your desire.

As to your statements regarding the theory of the contracts on which my letter proceeded I ask a careful reading of my letter. I stated that the Regulations which the law authorizes the Postmaster General to make for the conduct and performance of the business of the Department are Regulations not inconsistent with law and

that when Revised Statutes, Section 4002, was passed, a num-
39 ber of the Regulations referred to by you were in force, and they, together with others which are found necessary for the conduct of good service as contemplated by the Statutes, become a part of the contract between the Department and the companies. This is a very different statement from that which is contained in your letter.

The proposition which is contained in my letter, and upon which you comment as above noted, has been the rule of action with the Post Office Department in its relations with the railroad companies of the country for more than forty years and there has seldom been

any serious question regarding it until recently raised by some companies. Take, for instance, the requirement of railroad companies to perform terminal and side service without specific compensation, which is one of the items to which you object, I have not before me the full file of the Postal Laws and Regulations, but have examined them as far back as 1866. I find in the Regulations published that year that it is provided that:

"Railroad and steamboat contractors are to have the service performed at all offices within a quarter of a mile of their depots, stations, or landings, as well as at the terminal offices of their routes."

Between that period and the date of the passage of the law of 1873, upon the terms of which you rely, the Department entered into written contracts with railroad companies, in which the contracting companies bound themselves that:

"The mail shall be taken from and delivered into the post offices at the ends of the route; and also from into the intermediate offices on the route, or that may hereafter be established on the route, providing such intermediate offices, or such as may hereafter be established, are not over a quarter of a mile from the depot or station, or from the railroad track when no station has been established."

Neither the law of 1873 nor Statutes passed thereafter changing the rates of pay for railroad mail service, changed these service requirements, nor did the Executive construction placed upon those laws at any time proceed upon such a theory, for these services were always required as part of the service obligations.

40 This is further evidenced by the provisions of the Postal Regulations of 1873, next promulgated after the passage of the law of 1873, which makes the same provision with reference to this requirement. The provision next appears in the revision of 1879, and is found in that of 1883 and in the present volume—1902.

As to the reasonableness of the Department's present position regarding this requirement, I wish to call your attention to the fact that it is more liberal to the companies than in 1866 or 1873, as at that time this service was required of the companies without regard to the fact of the employment of an agent.

With reference to the transportation of Special Agents of the Department, I notice that the present requirement is found in the Regulations at least as far back as those of 1873, and are repeated in succeeding editions. It is also found in the form of the written contracts entered into with the railroad companies prior to the passage of the law of 1873.

In regard to your suggestion that the fact that Congress has not appropriated money to provide for an annual weighing would dictate the wisdom of arriving at an average yearly increase in the weight of the mails in order that the expense of the annual weighing might be avoided, I have to advise you that such a procedure has been determined by the Comptroller of the Treasury to be contrary to existing law.

I note what you say with reference to my statement regarding the power of Congress to reduce the rates of compensation. I do not

find anything in the cases which you cite which sustains the position you appear to take. Those cases do not dispute the right of Congress to legislate upon the subject, nor the right of the Postmaster General to readjust the rates of compensation in cases where the contracts were in the usual form made by the Department, namely, subject to future orders. In fact, the cases held that the reductions made by the Postmaster General in such cases were proper but that the railroad companies were not bound to continue carrying the mails at those readjusted rates unless they so chose to do. In cases of this character the decisions have been that if the company is dissatisfied or protests it cannot create a new contract thereby, but is at liberty to discontinue the carriage of the mails as the means of enforcing its protest.

41 I note your statement with reference to the attitude of your company regarding the carriage of the mails. The Department cannot recognize any relations with the company which will give color to the claim that the services performed under the Postal Regulations are separate from those for which Congress has fixed compensation, and I am obliged to say, as set forth in my previous letter, that any service which has been or may be performed by your company, as required by the Department, can be paid for only at the rates fixed by Congress for railroad mail transportation, and that the Department will not enter into any contract or relation with the company by which it may be excepted from the operation or effect of any postal law or regulation, and that it must be understood that in the performance of the service the company will be subject, as in the past, to all Postal Laws and Regulations which are now or may become applicable to such service.

The Postmaster General cannot exceed the authority vested in him by law. The position of this office is one intended to amicably continue the relations between your company and the Department as defined by law and regulations which have been so maintained for many years, and I trust you will see your way clear to forward the distance circulars, signed by some officer of your company.

Very respectfully,

JOSEPH STEWART,
Second Assistant Postmaster General.

The New York, New Haven and Hartford Railroad Company.
President's Office.

New Haven, Conn., July 27, 1909.

Hon. Frank H. Hitchcock, Postmaster General, Washington, D. C.

DEAR SIR: Please take notice that the commissions or certificates issued to railway postal clerks, entitling them to transportation over the lines of this Company prior to July 1st, 1909, have been since that date regarded by this Company only as documents of identification, and in the future will continue to be so regarded. These

commissions or certificates are not to be taken as evidence of transportation having been paid.

This Company will look to the Government to pay for the transportation of all representatives of the Post Office Department at the passenger schedule rates on file with the Interstate Commerce Commission.

Very truly yours,

C. S. MELLEN, *President.*

Copy to Mr. Joseph Stewart, Second Assistant Postmaster General, for his information.

Copy to Mr. Alexander Grant, General Superintendent Railway Mail Service, for his information.

Office of the Postmaster General.

Washington, D. C.

29th July, 1909.

Mr. C. S. Mellen, President, New York, New Haven & Hartford Railroad Company, New Haven, Connecticut.

SIR: Your letter of the 27th instant, notifying me that the commissions or certificates issued to railway postal clerks entitling them to transportation over the lines of your company prior to July 1, 1909, have since that date been regarded by your company only as documents of identification and in the future will continue to be so regarded, and that they are not to be taken as evidence of transportation having been paid but that the company will look to the Government to pay for the transportation for representatives of the Post Office Department at the passenger schedule rates, has been received.

In reply I have to call your attention to the letters addressed to you June 29 and July 28, 1909, by the Second Assistant Postmaster General, with reference to the terms and conditions upon which service on your lines is and will be recognized by the Department.

Revised Statutes, Section 4002, provides as one of the conditions upon which the company earns its transportation pay that it shall furnish suitable apartment in which railway postal clerks
43 may accompany and distribute the mails. This has been uniformly construed to require the transportation of railway postal clerks on duty as a part of this condition upon which it earns its transportation pay. Railway postal clerks traveling under orders of the Department and between their homes and the point on their lines where they take charge of mails, are and always have been regarded as on duty and entitled to transportation within the terms of these statutes.

Revised Statutes, Section 4000, provides that every railway company carrying the mails shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same.

Section 1184, Postal Laws and Regulations, provides that all rail-

road companies are required to convey upon any train, without specific charge therefor, all duly accredited agents of the Post Office Department and post office inspectors upon the exhibition of their credentials.

Revised Statutes, Section 4019 (Section 41, Postal Laws and Regulations), provides that the Postmaster General may employ, when the service requires it, the Assistant Postmasters General and Superintendents of his Department as special agents (post office inspectors). All persons traveling on the business of the Department, other than railway postal clerks, are commissioned by the Postmaster General under the provisions of this statute in accordance with the universal practice that has obtained since the passage of the law.

I therefore have to advise you that the Department will not enter into any contract with any railroad company by which it may be exempted from the operation or effect of any postal law or regulation, and it must be understood that in the performance of the service your company will be subject, as in the past, to all the postal laws and regulations, including those above mentioned, in accordance with which it is deemed the company's duty to carry all persons referred to, in the manner and for the purposes contemplated by the laws and regulations, as part of the service for the transportation pay fixed by the statute.

Respectfully,

F. H. HITCHCOCK,
Postmaster General.

44 The New York, New Haven and Hartford Railroad Company.

President's Office.

New Haven, Conn., August 10, 1909.

Hon. Joseph Stewart, Second Assistant Postmaster General. Washington, D. C.

My Dear Sir: I beg to acknowledge the receipt of yours of July 28th in reply to mine of July 8th.

In my letter I advisedly used the language regarding the method by which this Company determined the cost of carrying the mail. That method is set forth in detail in the letter of our Vice-President, Mr. Buckland, of September 11th, 1908. Neither the result nor the actual figures employed could any way illuminate the method. On the same day that Mr. Buckland sent his letter of September 11th he advised me that on September 9th he had called upon Acting Second Assistant Postmaster General Hollyday and yourself and had a conference with you regarding the information which you were seeking as to the cost of carrying the mail. When he explained to you the method which we had adopted, he was told that it was similar to the method used by the Pennsylvania Railroad Company but was more thorough. He was then asked to give you the substance of what he had orally stated. Therefore, he wrote to Mr. Hollyday his letter of September 11th.

In reply to my assertion that the Department has made no attempt to present to Congress the fact that we were carrying the mail at a loss you ask us to submit a statement which you will transmit to Congress. We are entirely capable of putting these facts before Congress ourselves, and have already done so in at least one instance. What we are entitled to is the recommendation of your Department to Congress to provide reasonable compensation for services performed. If you will agree to make such a recommendation, if our statement is proved, or to point out our error if it is not, we will cheerfully forward you our figures and meet with you in an endeavor to find out what it costs to carry the mail.

I note your argument that because certain regulations were effective prior to the enactment of the present law, it must be concluded that the law contemplated the continuance of service under such regulations. I submit that if the law had contemplated any such thing Congress would have said so and have enacted the regulations into law. The fact that Congress did *did* not say so argues powerfully that it intended to leave these regulations to be enforced or not at the discretion of the Postmaster General.

In regard to the decisions of the United States Supreme Court; you admit that the Company is at liberty to discontinue the carriage of the mails if Congress attempts to reduce the rate paid when the contract was entered into, or if the Postmaster General attempts to impose additional regulations which are not satisfactory to the carrier. This is all that I have contended for and I am glad to note your admission.

You reiterate that the Department cannot recognize any relations with the Company which will give color to the claim that services performed under the Postal Regulations are separate from those for which Congress has fixed compensation. Would it not be more accurate for you to say that the Department will not recognize any such relations? Unquestionably what the Postmaster General has the right to promulgate he also has a similar right to revoke.

It seems unnecessary to continue this correspondence. Our attitude as a common carrier requires us to carry for reasonable price such commodities as are tendered to us, whether they are United States mail, freight, express or passengers. If you tender us such a commodity we are bound to carry it for you, but we have the right to charge a reasonable rate for such carriage. You are at liberty, if you see fit, not to tender it, but if you continue to tender it you must be prepared to pay a reasonable rate as determined by the proper tribunal or authority.

We do not ask the Postmaster General "to exceed the authority vested in him by law." We only ask him to exercise such authority where injustice will otherwise be done. We cordially join with you in the desire to continue amicable relations between your office and this Company. Such relations can best be preserved if you do not continue to insist upon our signing contracts, the performance of which will result in a very considerable loss.

Yours truly,

C. S. MELLEN, *President.*

46 The New York, New Haven and Hartford Railroad Company.

President's Office.

New Haven, Conn., Aug. 10, 1909.

Hon. Frank H. Hitchcock, Postmaster General, Washington, D. C.

DEAR SIR: I beg to acknowledge the receipt of yours of July 29th in reply to mine of July 27th. I direct your attention to my letter of May 13th, 1909, to yourself, and of July 8th, 1909 to the Second Assistant Postmaster General. From them you will see no contract has been executed by this Company and the Government regarding the transportation of mail. Therefore, whatever may be your construction of the statutes where a contract has been entered into, such statutes do not apply where there is no contract.

This Company is not at liberty to refuse to carry any commodity which is tendered to it. At the same time it has the right to receive a reasonable compensation for the work which it performs. If the Government continues to tender the mail to the Company for carriage we shall try to collect from it a reasonable compensation.

What I have said in regard to the statutes applies with even greater force to regulations which you are at liberty to promulgate and revoke at your discretion. The question of what will or will not be recognized by your Department is of no consequence in the present circumstances.

Whenever your Department expresses itself as willing to help us to secure a reasonable compensation for services performed by recommendations to Congress we shall be glad to submit to you the results of our investigations which show that if we entered into a contract such as you are asking for we should lose nearly a million and a half of dollars in the performance of it.

Yours truly,

C. S. MELLEN, *President.*

47 Post Office Department.

Second Assistant Postmaster General.

Washington.

13th August, 1909.

Mr. C. S. Mellen, President, The New York, New Haven & Hartford Railroad Company, New Haven, Connecticut.

SIR: Your letter of the 10th instant, addressed to the Postmaster General, in reply to his of July 29, 1909, has been referred by him to me for reply.

The Department's views, with reference to the relations existing between your company and the Department in the matter of carrying the mails, are not the same as those expressed in your letter. We

maintain that the terms and conditions upon which mail service on your road may be performed and paid for are expressed by the Statutes and regulations of the Department; that the Department has specifically stated that all service performed and payment therefor are and will be governed thereby, and that no other relation can be recognized by the Department; that objection to and protest against these terms cannot create other and different ones, and that the rates of pay having been fixed by Congress, the Postmaster General has no power to exceed them. Our position in detail has been fully set forth in preceding letters, to which I beg to call your attention.

You state that whenever the Department expresses itself willing to help you to receive a reasonable compensation for service performed, by recommendation to Congress, you will be glad to submit the results of your investigations. The Department has at all times been ready to receive your figures, investigate your method, consider your conclusions, and forward them to Congress for such action as may be deemed proper. It is not desirable to advocate exceptional treatment for individual roads, and a recommendation to Congress upon
48 the subject of railroad mail pay should be broad enough to cover the whole service. This cannot be done on data relating to only one road. The Department is endeavoring to secure from railroad companies reliable data with reference to the cost of performing mail service as provided for by law. It is expected that the inquiries will be ready for reissue in a short time, and, when they are answered by the companies and the results are ascertained and tabulated in this office, it is expected that they will be transmitted to Congress with such recommendation as the Postmaster General may feel warranted in making.

Very respectfully,

JOSEPH STEWART,
Second Assistant Postmaster General.

The New York, New Haven and Hartford Railroad Company.

President's Office.

New Haven, Conn., August 19, 1909.

Hon. Joseph Stewart, Second Assistant Postmaster General, Washington, D. C.

DEAR SIR: I refer to yours of August 13th, receipt of which I beg to acknowledge. I regret that the Post Office Department's views as to the carrying of the mails do not coincide with those of this Company. My several letters will make plain the stand which this Company takes regarding its obligations as a common carrier, and the remedies which it will pursue to recover a reasonable compensation.

I also regret that I cannot agree with you that it is undesirable to advocate exceptional treatment for individual roads. To my mind the law and the regulations ought to be so framed as reasonably to compensate each company for the service which it performs. If any

company is being paid too much they should provide for reduction of such company's pay. If any company is being paid too
49 little they should provide for such company's pay to be increased to a reasonable figure. I fear that you will not be able to do even approximate justice to each Company until the law is made more flexible.

Yours truly,

C. S. MELLEN, *President.*

Post Office Department.

Second Assistant Postmaster General.

Washington.

August 24, 1909.

Mr. C. S. Mellen, President New York, New Haven & Hartford Railroad Company, New Haven, Connecticut.

SIR: Your letter of the 10th instant in reply to mine of July 28th was duly received, and other duties and absence from the city have prevented an earlier acknowledgement. I also beg to acknowledge receipt of your letter of the 19th in reply to mine of the 13th.

I regret the differences in understanding, as shown in our correspondence. Our positions have been fully stated upon both sides, and I agree with you that it seems unnecessary to continue the correspondence. There appears to be a radical difference between our views with reference to the relations between the Department and the company in the matter of carrying the mails and the remedies open to the company, where it feels aggrieved. The Department's position has been fully stated, from which it is impossible, as I view it, to recede. On the other hand, your position has also been stated. Under these circumstances I see no reason why you should not file the certified distance circulars, with the agreement clause signed, with the exceptions expressed in your correspondence. They would be received by the Department and pay orders issued, subject upon its part to all of the conditions and statements set forth in letters of the Postmaster General and myself. It seems to me that this would accomplish all that can be accomplished by your present course and
50 permit of the issuance of the usual pay orders at an early date.

Very respectfully,

JOSEPH STEWART,

Second Assistant Postmaster General.

The New York, New Haven and Hartford Railroad Company.

Traffic Department.

Office of Vice-President.

New Haven, Conn., November 4, 1909.

Mr. Joseph Stewart, Second Assistant Postmaster General, Washington, D. C.

DEAR SIR: Referring to earlier correspondence between the Post Office Department and this Company I beg to advise that we are sending you under separate cover today distance circulars covering routes as named below, same having been executed by Mr. Mellen on behalf of this Company.

(Here follows list of routes for which distance circulars were sent to cover.)

Please acknowledge receipt.

Yours truly,

B. CAMPBELL, *Vice-President.*

Form of Protest Attached to Distance Circulars.

New Haven, Conn., Nov. 3, 1909.

The Company named below agrees to accept and perform mail service upon the conditions now prescribed by law and the existing regulations of the department, protesting, however, that com-
51 pensation for such service is inadequate and unreasonably low and reserving the right to claim and recover a reasonable compensation for such service and for any additional service which it may hereafter agree to perform. This agreement and acceptance is upon the further condition that said Company shall not thereby be deemed to have modified its position or waived any of its rights as claimed and set forth in the following described letters, copies of which are attached hereto and made a part hereof:

Letter from C. S. Mellen to Hon. Frank H. Hitchcock, Postmaster General, dated May 13, 1909.

Letter from C. S. Mellen to Hon. Joseph Stewart, Second Assistant Postmaster General, dated July 8, 1909.

Letter from C. S. Mellen to Hon. Frank H. Hitchcock, Postmaster General, dated July 27, 1909.

Letter from C. S. Mellen to Hon. Joseph Stewart, Second Assistant Postmaster General, dated August 10, 1909.

Letter from C. S. Mellen to Hon. Frank H. Hitchcock, Postmaster General, dated August 10, 1909.

Letter from C. S. Mellen to Hon. Joseph Stewart, Second Assistant Postmaster General, dated August 19, 1909,

but that it shall have the same right to pursue all of its remedies that

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it would have had if it had not caused this distance circular to be signed.

This agreement and acceptance is upon the further condition that said Company shall not thereby be deemed to have admitted as valid any of the claims, contentions or statements of Postmaster General or the Second Assistant Postmaster General made in answer or reply to said letters, and upon the further condition that the receipt of any pay order or other form of order, or the acceptance of pay for the performance of said service shall not be construed to modify or waive the terms upon which this service is to be performed as herein set forth, but that this Company shall be deemed to accept such pay only as part payment on account of such performance in case it shall hereafter be determined by the Court of Claims or any other proper tribunal or authority that said pay is inadequate or unreasonably low.

This agreement and acceptance is upon the further condition that this Company shall not be required to haul upon its Limited trains any car for the exclusive use of the mails, if in the opinion
52 of the General Manager the hauling of such car will prevent such train from making its schedule time.

This agreement and acceptance is upon the further condition that this company does not recognize as valid or binding, Postmaster General's Order No. 165, dated March 2nd, 1907, or said Order as amended by Postmaster General's Order No. 412, dated June 7th, 1907.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.
C. S. MELLEN, *President.*

Post Office Department.

Second Assistant Postmaster General.

Washington, November 9, 1909.

Mr. B. Campbell, Vice-President, New York, New Haven & Hartford R. R. Co., New Haven, Connecticut.

SIR: The receipt is acknowledged of your letter of November 4, 1909, stating that distance circulars of certain routes of your company for the quadrennial term beginning July 1, 1909, had been forwarded to this office under separate cover. The circulars which are for the routes named below have also been received:

List of Routes.

107145. Hopewell Junction to Poughkeepsie.
107109. New Rochelle, N. Y., to Jersey City, N. J.
106026. New Haven to Botsford.
106025. Windsor Locks to Suffield.
106023. Branchville to Ridgefield.
106021. Farmington Sta., n. o. to New Hartford.
106020. Turnerville to Colchester.
106019. Litchfield to Hawleyville.

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106016. Hartford, Conn., to Springfield, Mass.
106015. Hartford to Saybrook Point.
106014. New Haven to Willimantic.
106013. So. Norwalk to Brookfield Junction, n. o.
106012. Bridgeport, Conn., to Pittsfield, Mass.
106011. Naugatuck Junction, n. o., to Winsted.
106010. New Haven, Conn., to Shelbourne Falls, Mass.
106009. New Canaan to Stamford Sta., n. o.
106007. Boston, Mass., to Hopewell Jct., N. Y.
106006. Waterbury to Watertown.
106005. New Haven, Conn., to Springfield, Mass.
106004. New York, N. Y. to Boston, Mass.
106002. New Britain to New Britain Jct., n. o.
106001. Worcester to Groton Sta., n. o.
105011. Woonsocket to Harrisville.
105008. Auburn to Hope.
105006. Providence to Pascoag.
105004. Pascoag, R. I., to Douglas Jct., n. o., Mass.
105003. Providence, R. I., to Willimantic, Conn.
105001. Providence, R. I., to Worcester, Mass.
104095. Marlboro Jct., n. o., to Marlboro.
104088. Plymouth to East Taunton Junction.
104081. Chatham to Harwich Junction, n. o.
104076. North Abington to Hanover.
104071. Van Deusen, n. o., to State Line.
104069. Holyoke to Westfield.
104065. Atlantic to Braintree.
104064. Braintree Jct., n. o. *yo* Kingston Sta., n. o.
104054. Norwood Jct., n. o., to Adamsdale Jct., n. o.
104052. East Thompson, Conn., to Southbridge, Mass.
104051. New Bedford to Fitchburg.
104049. South Framingham to Lowell.
104048. Yarmouth Jct., n. o., to Hyannis.
104047. Sterling Jct., to Pratts Jct.
104046. South Braintree to Plymouth.
104045. Buzzards Bay to Woods Hole.
104044. So. Braintree, Mass., to Newport, R. I.
104043. Attleboro to Attleboro Jct., n. o.
104042. West Roxbury, Sta. Boston, to Needham Jct., n. o.
104040. South Abington Sta., n. o., to Bridgewater, Mass.
104039. Middleboro to Somerset Jct., n. o.
104038. Boston to Provincetown.
104037. Canton Junction to Stoughton.
104036. Boston to Readville (Station Hyde Park.)
104034. Nantasket Junction, n. o. to Hull (Pembert on R. R. Sta.)
104033. Cook St. Sta. n. o., Mass. to Woonsocket, R. I.
104032. Harrison Square, n. o. to Mattapan.
104006. Franklin, Mass., to Valley Falls, R. I.

It is noted that the agreement clause at the top of the second page has been cancelled and in lieu thereof a printed form of agreement

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and acceptance has been substituted by your company and attached to each circular, together with copies of letters described in such printed form of agreement and acceptance.

This form is dated New Haven, Connecticut, November 3, 1909, and is signed by Mr. C. S. Mellen, as President of your company.

The Post Office Department receives these distance circulars in order that the certified distances may be used in the computation of the average daily weight and the adjustment of compensation
53 on the routes be made as provided for by law. In regard to the statements contained in the printed form of agreement and acceptance, and in reply thereto, you are advised that, notwithstanding the same, the Post Office Department will not enter into any contract with the New York, New Haven and Hartford Railroad Company by which it may be excepted from the operation or effect of any postal law or regulation and that, in the performance of the service in the past and in the future, the Department claims that the company will be subject as in the past, to all the postal laws and regulations which are now or may become applicable during such service; that for service no greater compensation can be paid than that provided by the statute and regulations and fixed by the orders of the Postmaster General, receipt of which is regarded by the Postmaster General as full payment for services rendered, and that the Department can not recognize any relations with the company which will give color to the claim that the services performed under the postal regulations are separate from those for which Congress has fixed compensation; special reference being had to the letter from the Postmaster General and letters from the Second Assistant Postmaster General to officers of the company of the following dates: June 29, 1909; July 28, 1909; July 29, 1909; and August 13, 1909.

Very respectfully,

(Signed) JOSEPH STEWART,
Second Assistant Postmaster General.

54 III. *Defendants' Amended Demurrer.*

Filed October 12, 1917, by Leave of Court.

Defendants' Amended Demurrer.

Come now the defendants above named by their Attorney General and by leave of court demur separately and severally to the first count, to the second count, to the first five paragraphs of the first count, to the sixth paragraph of the first count, of the amended petition, and to the amended petition, for the reason that neither of the same states facts sufficient to constitute a cause of action.

HUSTON THOMPSON,
Assistant Attorney General.
JOSEPH STEWART,
Special Assistant to the Attorney General.

IN CENTER

IV. *Order of Court Entered November 5, 1917.*

On motion of Mr. S. S. Ashbaugh, for the claimant, it was ordered, in open court, that the pamphlet entitled "Correspondence between the New York, New Haven and Hartford Railroad Company and the Postoffice Department regarding the carriage of mail," and copy of letter of November 9, 1909, from Joseph Stewart to B. Campbell, be filed, and marked exhibit "D" and made part of the petition.

55 V. *Argument and Submission of Demurrer.*

New York, New Haven & Hartford R. R. Co., No. 33082.
Boston and Maine Railroad Company, No. 33083.
The Maine Central Railroad Company, No. 33084.

On November 5, 1917, the defendants' demurrer to the amended petitions in these cases were argued by Mr. Joseph Stewart, for the defendants, and continued by Mr. Samuel S. Ashbaugh, for the claimants.

On November 6, 1917, the argument was continued by Mr. Ashbaugh and Mr. Edward G. Buckland, for the claimants, and by Mr. J. R. Anderson, for the defendants, and the demurrers were submitted.

56 VI. *Opinion of the Court by Barney, J.*

Filed February 25, 1918.

BARNEY, Judge, delivered the opinion of the court.

The defendants demur to the amended petition of the plaintiff consisting of two counts. The first count embraces two claims. The first claim in this count is an alleged balance due because of the improper and illegal construction given by the Post Office Department to section 4002 of the Revised Statutes, as amended, in the weighing of the mails, and in determining the amount thereof carried by the plaintiff, as well as its proper compensation for the same. The second claim in the first count is for additional compensation for carrying parcel-post packages, after the same were added to the mails by the act of Congress of August 24, 1912, 37 Stat., 557.

The second count of the petition is for a sum alleged to be due the plaintiff over and above the amount which it has already received for carrying the mails, because the amount so received has been insufficient for the expense of carriage, and in consequence of which the compensation fixed by the Postmaster General is unjust, unreasonable, and confiscatory, whereby the private property of the plaintiff has been taken for public use without due compensation; or, as we understand it, a claim under the Fifth Amendment of the

Constitution for the taking of the property of the plaintiff for public use without just compensation.

We will discuss these claims as stated in their order. That part of section 4002 of the Revised Statutes which relates to the present issue is as follows:

"That the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars [now $42.75] * * * the average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days not less than thirty [now 90] at such times after June thirtieth, eighteen hundred and seventy-three and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

The amendments to said section are immaterial in the discussion of this claim and therefore except as above are not given.

57 It is alleged that the Postmaster General in ascertaining the average weight of the mails carried by the plaintiff and other railroads "has weighed the mails only once in four years and the daily average thus obtained was used by the Postmaster General as the basis for stating the daily average weight of the mails carried for the whole quadrennial period beginning some months after such weighing was made, and that the plaintiff thus received its compensation for the carriage of the mails upon a basis of the average amount carried so ascertained some months before the quadrennial period of its contract began; and that as the amount of the mails carried by the plaintiff was continually increasing from year to year the plaintiff was compelled to carry a large amount of mails for which it has never received any compensation."

It is contended by the plaintiff that under the statute quoted it was the duty of the Postmaster General to more accurately and justly ascertain the average weight of mails carried annually by the plaintiff, and that this should and could have been done either by weighing the mails annually during the term of the quadrennial contract periods, or by weighing the mails at the beginning and end of each of said periods, and taking an average of said weights as the contract basis. It is also contended by the plaintiff that under the law it was compelled to carry the mails, and that that fact should be considered in the consideration of this case.

We can not agree with the contention of the plaintiff that in the weighing of the mails section 4002 was not properly construed and administered by the Postmaster General. That section provides that the railroads shall be paid for carrying the mails according to the average weight so carried. This was done because it would have been practically impossible to determine the weight of the mails carried every day. This average weight was to be determined by weighing the mails not less than once in four years. It is not necessary to argue that if the mails were weighed once in four years this statute in that respect was properly administered. The details to be

followed in this matter were entirely at the discretion and under the direction of the Postmaster General. He alone was to determine the average weight of the mails carried and how such average should be obtained.

Now, as to the contract with the railroads after this average is determined. The terms of such contract were entirely within the discretion of the Postmaster General. The railroad company had nothing whatever to do with this weighing; it was all for the benefit of the Postmaster General to give him information to enable him to exercise wise discretion in paying the railroads for carrying the mails, and when so exercised the railroads could accept the terms offered them or not as they should determine. This statement, of course, does not refer to land-grant railroads. The contention of the plaintiff that nonland-grant railroads are Government agencies and thus could be compelled to carry the mails whether they wished so to do or not finds no authority anywhere in the books. Anyone who performs a contract for the Government, while so performing, is in a sense a Government agency, but that does not relieve him from the obligations of his contract and did not compel him to enter into it.

58 This distinction between land-grant and nonland-grant railroads has always been recognized. So far as we have been able to ascertain, all of the grants to railroads of public land, except in the case of the Union Pacific Railroad, have contained the provision that the "United States mail shall at all times be transported on said railroad under the direction of the Post Office Department at such price as Congress may by law direct; and until such price is fixed by law the Postmaster General may fix the rate of compensation."

If all railroads could be compelled to carry the mails why did the Congress insist upon this provision? It is hardly necessary to cite authorities upon this point of the compulsion of the railroads, but the following are some of them: Union Pacific Ry. Co. v. United States, 104 U. S., 662, 665; Eastern R. R. Co. v. United States, 20 C. Cls., 23; S. C., 129 U. S., 391; Atchison, Topeka, etc., Ry. Co. v. United States, 225 U. S. 640; Texas & Pacific Ry. Co. v. United States, 28 C. Cls., 379. In the Eastern Railroad case Chief Justice Richardson, speaking for this court, and which language was approved by the Supreme Court, said that the order for the reduction of compensation made by the Postmaster General "constituted an offer on the part of the Postmaster General which the claimant might decline or accept at its pleasure."

Of course, all this has been changed by the act of Congress of July 28, 1916, 39 Stat., 412, 429, which provides that railroads may now be compelled to carry the mails, and further provides the manner in which their pay for such service is to be determined. The fact of the enactment of this law is at least presumptive evidence that no such power theretofore existed. This legislation, however, does not affect any of the issues in this case.

It is averred in the petition that the plaintiff in filling out each

of the distance circulars which it received from the Post Office Department during the period of its service in carrying the mails added a refusal to accept the same as full compensation, whereupon the Postmaster General informed the plaintiff that this compensation was all that would be paid for the service. That was all of the correspondence upon the subject and the plaintiff continued to carry the mails. The plaintiff insists that this shows that there was no meeting of the minds of the parties to the contract and hence that no contract for the carrying of the mails by the plaintiff was ever made.

We can not agree with this claim, for the "meeting of the minds" of the parties was consummated when the plaintiff received this notice from the Postmaster General and still continued to carry the mails. After receiving this notice the plaintiff had the alternative of carrying the mails upon the terms offered by the Postmaster General or refusing to carry them at all. It chose to continue to carry the mails and is bound by the terms offered it for such service.

This brings us to the second cause of action in the first count, namely, the alleged overloading of the mails by the Parcel Post Service. This branch of the case set out in the petition can be considered from two viewpoints: First, Did the increasing of the Parcel Post Service by the act of August 12, 1912 (37 Stat., 539, 557), relieve the railroads from the obligations of their contract for the carrying of the mail made before the enactment of that law?

Second, If it did and they still continued the service, including the added parcel-post matter, and also accepted the added compensation therefor provided by the act of March 4, 1913 (37 Stat., 791, 797), was that a reaffirmance by such roads of the contracts entered into before such increase of mail matter?

59

That at least a part of this added compensation was received by the plaintiff is admitted in its brief. We believe that the first interrogatory should be answered in the negative. For various reasons the volume of mails carried has been abnormally increased at times for a long series of years. The plaintiff agreed to carry the mails with knowledge of this fact.

But without extending the discussion of this view of the question involved further, and even admitting such an abnormal increase of the mails by the extension of the parcel-post contingency as would have constituted a violation of the contract which the plaintiff had entered into with the Government, and would have justified it in refusing to perform its contract further, it did not do so. It continued in its performance without any change in its terms. It was offered the mails for carriage under its contract and it took them and accepted the increased compensation provided therefor by law. It thus reaffirmed its contract and it is now too late to claim an additional allowance for such service. Lackawanna, etc., Ry. Co. v. United States, 51 C. Cls., 426; Atchison, Topeka, etc., Ry. Co. v. United States, 52 C. Cls., 338; Eastern R. R. v. United States, 129 U. S., 391; Vogt v. Milwaukee (Wis.) 74 N. W. Rpt. 789.

The case of Vogt v. Milwaukee was a suit by the plaintiff to recover

for working overtime, an ordinance of the defendant city providing that eight hours should constitute a day's work. The plaintiff for two months had worked eight hours a day and for ten months twelve hours a day, receiving the same wages during both periods. He had received such wages regularly and signed the pay rolls without protest. It was held that he was estopped after his discharge from claiming for extra work overtime. In the opinion in that case the court said:

"In absence of an express contract—and none is claimed—as to overtime, the fact that the pay rolls were made out, and his wages paid him, at a given rate, as effectively notified him that his compensation for the time in service was the rate so specified as if he were formally notified. * * * The law which allows contracting parties, through the medium of an express contract, to fix in advance the value of a service to be rendered also allows them to fix the value in cases of implied contract, after the service has been rendered. It may as well be fixed by acts of the parties as by express agreement."

We now come to the second count of plaintiff's petition, which is a claim for the alleged taking of private property for public use without just compensation. This claim is based upon the alleged fact that owing to various circumstances, like the increased cost of material and labor, the compensation received by the plaintiff for the carriage of the mails during the term of its contracts was far below a reasonable one; in fact, was less than cost and hence to that extent confiscatory. If the plaintiff had been compelled to carry the mails without a contract for that purpose and claimed greater compensation therefor than it received and that less was unreasonable and confiscatory, there would be a sound basis for this claim. However, all of the service which it rendered was
60 under contracts voluntarily entered into with the Government. It may have lost money by such contracts; it may have lost so much as to bankrupt it and thus make it in effect completely confiscatory; but that would not be the first time that contractors have lost money by their engagements with the Government; and we have never before known any contractor to claim that property lost by him in the performance of a contract with the Government had been taken from him within the meaning of the Fifth Amendment, and hence that he was entitled to just compensation for the same. What constitutes a "taking" within the meaning of the fifth amendment is a question this court is often called upon to determine, and we have never examined a case in any court where property voluntarily given up and paid for under contract has been claimed as taken under the Fifth Amendment.

The plaintiff may have been constrained to take less under its contract than it thought was reasonable in amount because its refusal would be an intolerable hardship to other customers whom it served, but certainly it will not be contended that it was compelled to do this by duress. Neither was the plaintiff compelled to receive the mails from the Government as a common carrier, for in the carriage

of the mails the railroads are not common carriers. Atchison, Topeka, etc., Ry. Co. v. United States, 225 U. S. 649; Seasight v. Stokes, 3 Howard, 151, 169.

It follows from the foregoing that the demurrer to the amended petition of the plaintiff should be sustained, and the petition dismissed.

Hay, Judge; Downey, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

61 VII. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 25th day of February, A. D., 1918, it was ordered that the demurrer to the claimant's amended petition be sustained, and that the amended petition of the claimant, The New York, New Haven and Hartford Railroad Company, be and it hereby is dismissed.

By THE COURT.

VIII. *Claimant's Application for, and Allowance of, Appeal.*

Comes now the plaintiff above named on this 28th day of March, 1918, and makes application for and gives notice of an appeal to the Supreme Court of the United States from the judgment heretofore entered herein on February 25th, 1918, sustaining the defendant's demurrer to the plaintiff's amended petition and dismissing said amended petition.

S. S. ASHBAUGH,
Attorney for Plaintiff.

Filed March 28, 1918.

Ordered: That the above appeal be allowed as prayed for.
March 28, 1918.

By THE COURT.

62 In the Court of Claims.

No. 33082.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY

vs.

THE UNITED STATES.

I, Sam'l A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the opinion of the Court; of the judgment of the Court; of the application of claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City this First day of April, A. D. 1918.

[Seal Court of Claims.]

SAM'L A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,411. Court of Claims. Term No. 944. The New York, New Haven & Hartford Railroad Company, appellant, vs. The United States. Filed April 2d, 1918. File No. 26,411.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

No. [redacted]74

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, *Appellant*,
vs.
THE UNITED STATES.

BRIEF FOR APPELLANT.

S. S. ASHBAUGH,
Attorney for Appellant.

EDWARD G. BUCKLAND,
ARTHUR P. RUSSELL,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 396.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, *Appellant*,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

The petition was filed in the Court of Claims on the 28th day of June, 1915, demanding an increased compensation for carrying the mails during the six fiscal years ended June 30, 1914, and amended petition was filed on January 26, 1917, adding a section of the statute, the distance circulars, and the notice of adjustment of pay; to which amended petition a demurrer was filed

on October 12, 1917, which demurrer was sustained on February 25, 1918, and the petition dismissed. On March 28, 1918, an appeal was allowed, and the record was filed in this court on April 2, 1918.

STATEMENT OF THE FACTS.

Two Causes of Action.

True Weight—Fair Pay.

The original petition and the amended petition each contained two causes of action, the amended petition only adding a portion of the statute, Exhibit A, page 7 of the record, the distance circulars, Exhibit B, page 8, and the notice of adjustment of pay, Exhibit C, page 10, with appropriate allegations of inclusion. The correspondence between the claimant and the Post Office Department in regard to the compensation was filed at the hearing, and was by order of court made a part of the amended petition, page 36, and is set out as Exhibit D, pages 11 to 35, inclusive.

First Count.

It is alleged in the first count of the petition that the claimant during the period mentioned was a common carrier doing business in the States of New York, Connecticut, Rhode Island and Massachusetts, and under the laws of the United States, particularly Section 4002, Revised Statutes, and the amendments thereto, Exhibit A, page 7, the rules and Regulations of the Post Office Department, and the several announcements, refusals and protests of the claimant as to the compensation set

out in Exhibits B and D, was also as an agency of the Government of the United States engaged in the transportation of the mails of the United States for the six fiscal years beginning July 1, 1909, and ended June 30, 1914.

It is further alleged that under paragraph 4002 of the Revised Statutes and the amendments thereto, a portion of which is set out as Exhibit A, the claimant was entitled to receive compensation per mile per annum not to exceed $42.75, on routes carrying their whole length an average weight of mails per day of 200 pounds. The average weight of mail was to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than ninety, not less frequently than once in every four years, and the result was to be stated and verified in such form and manner as the Postmaster General may direct.

It is alleged that this law has not been complied with by the Postmaster General, and that no weight of mails was ascertained during any of the fiscal years in the period named, as a basis of pay for that year, but that the Postmaster General, in disregard and violation of this law, weighed the mails only prior to each of the quadrennial periods named, and the compensation for subsequent years was fixed upon the average amount of mail thus obtained at a time other and earlier than the year for which the compensation was fixed by Congress, notwithstanding the fact that there had been annually a substantial increase of the amount carried. The several weights are given in the petition, and the amount of compensation named which the claimant was entitled

to receive under the statute in excess of the amount actually received for each of these fiscal years, as prescribed by law.

It is further alleged that after January 1, 1913, and for the balance of the period until June 30, 1914, the Postmaster General added to the amount of mail which he had ascertained by the weighing in the fall of 1908 and 1912, certain amounts of parcel post mail which were not included in the amounts as ascertained at these quadrennial weighings, and for which no adequate compensation was prescribed.

It is further alleged that the small amount of compensation paid by the Postmaster General under the Parcel Post law of August 24, 1912, was in no sense a compliance with the law to pay the claimant for the amount of mail carried after January 1, 1913, down to June 30, 1914.

It is further alleged that the Postmaster General, under a rule and regulation of the Post Office Department, has required this claimant to gather and deliver mail at intermediate post offices off from and beyond the claimant's right of way, and at a distance not to exceed 80 rods, and that this side service is not authorized by law and was not included in the compensation as fixed by Congress, but that the service was performed under the orders of the Postmaster General, was accepted by him, and no compensation whatever received therefor by the claimant.

It is therefore alleged that under the law the claimant is entitled to pay each year for the amount of mail carried that year.

Second Count.

It is alleged in the second count of the petition that the claimant has under its obligation created by statute as an agency of the Government carried such mails of the United States during the six fiscal years beginning July 1, 1909, as were daily deposited with it for that purpose, but that the compensation given by the Postmaster General to the claimant for this service was inadequate, unremunerative, confiscatory, and unconstitutional; and that the claimant never agreed to carry such mails at the compensation proposed by the Postmaster General, but on the contrary refused to accept the same as full compensation, which refusal was received and acknowledged by the Postmaster General, and the distance circular was with his consent filed containing the refusals and exceptions expressed in the claimant's correspondence, and thereupon the Postmaster General delivered the mails for transportation, and, with this announcement and refusal before him, issued the usual pay orders at the regular times during the period in question.

It is therefore claimed that under the constitution and the laws the claimant is entitled to a just compensation over and above the amount received for the value of the service each year as set out in the petition.

ARGUMENT.

Point One.—Protest.

No Agreement as to Compensation.

The Claimant carried the mails during the period involved with the distinct declaration that it would not ac-

accept the amount of pay offered by the Postmaster General as full compensation for the services, which declaration in writing was acknowledged by the Postmaster General, the mails were then delivered for carriage, and the usual pay orders were issued thereon.

That there was no agreement between the claimant and the Post Office Department as to the compensation for carrying the mails during the quadrennial period beginning July 1, 1909, is clearly shown in the correspondence between the parties on this point set out in Exhibit D, pages 11 to 35 of the record, and for the quadrennial period beginning July 1, 1913, in Exhibit B, pages 8 to 11.

In the first letter on the subject under date of May 13, 1909, the President of the New Haven Company said, page 15:

> "It, therefore, desires at this time, before the beginning of the new four year period on July 1, 1909, to state to you some of the reasons why it should not accept the conditions imposed by the department by signing said distance circulars which are construed by the department as assenting by it to the carrying of the mail at a continuing loss."

To this letter the Second Assistant Postmaster General replied at length on June 29, 1909, finally saying on page 18 that

> "it must be understood that, in the performance of service your company will be subject, as in the past, to all the postal laws and regulations which are now or may become applicable during such service, and

that for service no greater compensation can be paid than that provided by the statute and regulations and fixed by the orders of the Postmaster General."

To this proposed "understanding" the President of the company replied on page 22, as follows:

"This company is now willing to carry the mail and to perform any service in relation thereto for a price which may by a competent tribunal be determined to be a reasonable one for the services contemplated, but it absolutely declines to enter into any contract which shall give the Postmaster General, or anyone representing him, the right to impose at his pleasure additional burdens and leaving the company without recourse or remedy, be sole judge as to whether the contract is properly performed."

To this the Post Office Department replied on page 25 in largely the former language, that

"it must be understood that in the performance of the service the company will be subject, as in the past, to all Postal Laws and Regulations which are now or may become applicable to such service."

This same language in effect is found in another letter of July 29, 1909, on page 27 of the record.

Under date of August 10, 1909, the President of the company again said, page 28 of the record:

"You are at liberty, if you see fit, not to tender it, but if you continue to tender it you must be prepared to pay a reasonable rate as determined by the proper tribunal or authority."

Again on August 10, 1909, the President said, page 29:

> "If the Government continues to tender the mail to the company for carriage we shall try to collect from it a reasonable compensation."

In the reply under date of August 13, 1909, page 29, the Post Office Department no longer attempted to reach an "understanding" as to the compensation, and contented itself with restating its position.

On August 19, 1909, page 30, the President stated the view of the company, "and the remedies which it will pursue to recover a reasonable compensation."

In the letter of August 24, 1909, page 31, the Post Office Department entirely abandoned the idea of any "understanding" as to compensation for carrying the mails, and says:

> "I regret the differences in understanding, as shown in our correspondence. Our positions have been fully stated upon both sides, and I agree with you that it seems unnecessary to continue the correspondence. There appears to be a radical difference between our views with reference to the relations between the Department and the company in the matter of carrying the mails and the remedies open to the company, where it feels aggrieved. The Department's position has been fully stated from which it is impossible, as I view it, to recede. On the other hand, your position has also been stated. Under these circumstances I see no reason why you should not file the certified distance circulars, with the agreement clause signed, with the exceptions ex-

pressed in your correspondence. They would be received by the Department and pay orders issued, subject upon its part to all of the conditions and statements set forth in letters of the Postmaster General and myself. It seems to me that this would accomplish all that can be accomplished by your present course and permit of the issuance of the usual pay orders at an early date."

This same view was announced in accepting the distance circular filed with protests. This distance circular expressly says, beginning at the bottom of page 32 of the record, that the claimant "shall have the same right to pursue all its remedies that it would have had if it had not caused this distance circular to be signed." It then further provides on page 33:

"This agreement and acceptance is upon the further condition that said company shall not thereby be deemed to have admitted as valid any of the claims, contentions or statements of Postmaster General or the Second Assistant Postmaster General made in answer or reply to said letters, and upon the further condition that the receipt of any pay order or other form of order, or the acceptance of pay for the performance of said service shall not be construed to modify or waive the terms upon which this service is to be performed as herein set forth, but that this company shall be deemed to accept such pay only as part payment on account of such performance in case it shall hereafter be determined by the Court of Claims or any other proper tribunal or authority that said pay is inadequate or unreasonably low."

The final word of the Department was contained in letter from Joseph Stewart, Second Assistant Postmas-

ter General, to Mr. B. Campbell, Vice-President, The New York, New Haven and Hartford Railroad Company, dated November 9, 1909, wherein he says:

> "In the performance of service in the past and in the future, the Department claims that the Company will be subject as in the past, to all the postal laws and regulations which are now or may become applicable during such service." (Page 35 record.)

Note that herein the Department has abandoned the phrase "it must be understood" and inserted the phrase "the Department claims," so that each party is in the position where it may present its claim as to the nature of the transaction and the law applicable thereto.

The objections and protests contained in the distance circular for the quadrennial period beginning July 1, 1913, Exhibit B, page 9, while not so extended, yet are sufficiently full and specific to preserve every right of the claimant, and to this distance circular the correspondence of 1909 will equally apply.

From this correspondence and those distance circulars it is clear that whether all railroads were during these fiscal years under obligation to carry the mails or not, yet the claimant has shown in the petition that no agreement was ever entered into between the parties as to the compensation for carrying the mails. With this fact before it in writing, yet the Post Office Department delivered the mails daily to the claimant for transportation and issued its pay orders therefor. With all this correspondence in the petition it is not easily understood how the court below could say in the opinion on page 40 of the record that, "However, all the service which it rendered

was under contracts voluntarily entered into with the Government," for it is not pretended that an agreement was reached as to compensation for the service.

The offer of the claimant to perform the service must not be confused with its refusal to accept the compensation offered. This refusal placed the responsibility on the Postmaster General; if he delivered the mails for transportation they would be accepted only on the grounds that the compensation was to be fixed by the courts. This is exactly what this correspondence says and what it means, and in itself furnishes a good cause of action in the second count of the petition.

Point Two.—Fair Pay.

Obligation of Railroad Companies as Common Carriers and as Mail Carriers.

When the United States, through the New Haven Company, exercised the governmental function of carrying the mails it was bound to pay and the Company was entitled to receive reasonable compensation for performing the agency.

Under the requirements of law and of its charter the New Haven Company was a common carrier with all of a common carrier's right and obligations. It was bound to carry all proper commodities for consignors when tendered. Likewise it was bound as the agent of the government to carry mail when tendered, but for each service it was entitled to receive reasonable compensation. If it carried flour for a miller, munitions for the War Department or mail for the Post Office Department, in each case the compensation must be rea-

sonable. Neither the miller nor the War Department could be subjected to the burden of an excessive rate, nor the Post Office Department be favored with an inadequate rate and so profit and make a showing at the expense of the other two.

The sending of a distance circular to the New Haven Company was in effect a demand by the Postmaster General that it carry the mail over the route designated in the circular as the agent of the government. The Company was charged with knowledge of the law requiring the Postmaster General to cause the mails to be carried over this route, and of the law requiring it as a common carrier to perform the service. Having this knowledge it would have been foolish to await mandamus proceedings to which it could have offered no defense, in the meantime causing unnecessary hardship to the community which it served—the inevitable result being only a futile litigation with the government.

When the stage coach and private conveyance were succeeded by railroads, Congress recognized these principles and early demanded that common carriers should carry the mails. For this there was direct constitutional authority, and the obligations were fixed and rights were protected.

> "Congress shall have power. . . . To establish post offices and post roads";

Recognizing these common law obligations of carriers, Congress proceeded to emphasize them so as to include mail as well as passengers and freight, and ample enactments were made for this purpose.

On July 7, 1838, 5 Stat., 385, there was passed "An Act to Establish certain Post Routes, and to discontinue others," which contained the following provisions:

> "That each and every railroad within the limits of the United States, which now is, or hereafter may be, made, and completed shall be a post route; and the Postmaster General shall cause the mail to be transported thereon,"

upon terms then set out.

The conditions and pay for carrying the mails set out in this section have been modified by later statutes; January 25, 1839; 5 Stat. 314; February 25, 1845, 5 Stat., 796, and March 3, 1845, 5 Stat., 738, 796, 800. The original enactment creating railroads as post routes, and authorizing and directing the Postmaster General to "cause the mails to be transported thereon" has never been repealed, but was retained in the codification of June 8, 1872, 17 Stat., 315, and the subsequent statutes found in Revised Statutes 1878, beginning at page 750. There has from July 7, 1838, down to the present time been no hiatus in the power and direction of the Postmaster General and no withdrawal of the obligation laid upon him to cause the mails to be carried by railroad.

The sections of the Revised Statutes bearing upon this subject are as follows:

> "Sec. 3956. No contract for carrying the mail shall be made for a longer term than four years, and no contract for carrying the mail on the sea shall be made for a longer term than two years."

"Sec. 3964. The following are established post-roads:

"All railroads or parts of railroads which are now or hereafter may be in operation."

"Sec. 3965. The Postmaster General shall provide for carrying the mail on all post roads established by law, as often as he, having due regard to productiveness and other circumstances, may think proper."

"Sec. 3966. The Postmaster General shall cause a mail to be carried from the nearest post office on any established post road to the court house of any county in the United States which is without a mail."

"Sec. 4000. Every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of same."

"Sec. 4001. All railway companies to which the United States have furnished aid by grant of lands right of way, or otherwise, shall carry the mail at such prices as Congress may by law provide; and until such price is fixed by law, the Postmaster General may fix the rate of compensation."

It will be noticed that Sections 3965 and 3966 are mandatory, while sections following them are discretionary.

That portion of paragraph 4002, Revised Statutes, Sec. 1317, Postal Laws and Regulations, 1913, which is applicable to the present issue, is as follows:

"First. That the mails shall be conveyed with due frequency and speed; and that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be

provided for * * * (railway postal clerk), to accompany and distribute the mails."

"Second. That the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars (now $42.75); * * * the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty (now ninety) at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

From these statutes and the decisions construing the same, the carrying of the mails by a railroad as a common carrier is made compulsory, and the Postmaster General is required to demand this service.

In the *Debs* case, 158 U. S., 577; 39 L., 1101, Mr. Justice Brewer quotes Section 5258, Revised Statutes, in full as supporting that decision, which section reads as follows:

"That every railroad company in the United States whose road is operated by steam, its successors and assigns, be, and is hereby authorized to carry upon and over its roads, boats, bridges and ferries, all passengers, troops, Government supplies, mails, freight and property on its way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination."

In the case of *Searight v. Stokes*, 3 *Howard*, 151, 169, 11 L., 537, Mr. Chief Justice Taney held that, "The United States have unquestionably a property in the mails," and that "A carriage when it is carrying the mail is laden with the property of the United States within the true meaning of the compact."

In the *Debs* case the defendant was sent to jail for interfering with the transportation of the mails, not with interrupting the performance of a contract. He interfered with the primary obligation, not with earning the compensation. This is the foundation of all the statutes protecting the mails, and of all the decisions enforcing them. Mr. Chief Justice Taney in the *Searight* case further said, that the United States in carrying the mails "are not mere common carriers, but a Government performing a high official duty in holding and guarding its own property as well as that of its citizens committed to its care."

These same views were expressed and the same conclusions reached in the case of *Bankers' Mutual Co. v. Minneapolis, St. P. & S. S. M. Ry Co.*, 117 Fed., 434, where it is said:

> "It seems clear to us that defendant in error was a public agent of the United States in relation to carrying the mail for the reason that the Constitution of the United States conferred upon it the power to establish post offices and post roads, and this power was granted by the people as one of the sovereign powers to be exercised by the general government exclusively. By virtue of this grant of power, the United States has always, through its post office department assumed the exclusive charge of the car-

riage and delivery of the mail for the benefit of all the people. In doing so, the United States is beyond question engaged in the discharge of a governmental function. All persons or corporations who are engaged in the carriage or delivery of the mail by the authority of the United States conferred by contract or general laws, are but the instruments used by it to discharge this function"

Union Pacific R. R. v. United States, 219 Fed., 427.

Great Northern Ry. v. United States, 236 Fed., 433.

It is in this sense that Mr. Justice Lamar said in the *Santa Fe* case, 225 U. S., 640, that in carrying the mails the railroads are "serving as an agency of the Government." The dicta in certain cases can all be harmonized with the decisions when applied to the compensation, for under the Fifth Amendment which prohibits the taking of "private property for public use without just compensation," the railroads can protect themselves against confiscatory rates, as has been done by the claimant in this case.

In the case of the land grant railroads, when it was put into their charters that they should carry the mails at such compensation as Congress might direct, no new obligation was thereby placed on them which was not imposed upon other railroads, but only a different and relatively less compensation was to be paid each year in cash, because of the aid which had been granted as a prior part of the consideration. This is clear from the decision in the *Union Pacific* case, 104 U. S., 662, 26 L., 885, based on the statute quoted as follows:

> "United States mail shall at all times be transported on said railroads; under the direction of the Post Office Department at such prices as Congress may by law direct."

The proportional amount of the annual cash payment is set out in the *Northwestern* case, 104 U. S., 686, 26 L., 891, where a later statute is quoted:

> "That railroad companies, whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their road at such prices as Congress should by law direct, shall receive only eighty per centum of the compensation authorized by this act."

The charters of the land grant roads merely established annual compensation proportional to the compensation of non-land grant roads, but did not create a new or different obligation in carrying the mails.

In the *Union Pacific* case, 104 U. S., 662, 26 L., 885, Mr. Justice Matthews says:

> "For the Revised Statutes as we have found, do not apply, and, therefore, did not alter the contract, and gave to the Postmaster General no authority to insist that it was not binding; and as the company, by its terms, was bound to render the service, if required, its compliance can not be regarded as a waiver of any of its rights. The service can not be treated as voluntary, in the sense of submission to exactions, believed to be illegal, so as to justify an implied agreement to accept the compensation allowed; for, according to the terms of the obligation,

which it did recognize and now seeks to enforce, it had no option to refuse performance when required. But it might perform, rejecting illegal conditions attached to the requirement, and save all its rights. This it did."

In the *Northwestern* case, 104 U. S., 680, 26 L., 893 Mr. Justice Matthews again says:

"Of course, if it was not the intention of the acts of Congress referred to, to affect the contracts of the appellant, the erroneous interpretation of them by the Postmaster General, and his action under it, can not give to them any different effect, for the rights of the parties depend on the law itself. And the performance by the railroad company of the service required by its contract, notwithstanding the notice of the intended reduction of the compensation by the Postmaster General, can not be construed as a waiver of its rights or an acquiescence in new proposals; and that, whether it had protested against the erroneous construction of the law or not; for it had no option. It was bound by its contract to perform the service, and its performance was demanded. It was not in a position absolutely to refuse to carry the mails, for it was bound to carry them, if offered, on some terms, either prescribed by law or affixed by contract; and it had the right to do so without prejudice to its lawful claims, leaving the ultimate right to future and final decision."

The same views were repeated in the *Milwaukee* case, 104 U. S., 687, 26 L., 893.

In the case of the *Eastern Railroad Co. v. United States*, 129 U. S., 391, 32 L., 731, the issue was practi-

cally the same as that presented in the *Union Pacific, Northwestern,* and the *Milwaukee* cases, cited above. In the first three of these cases it was held that the reduction would not apply during the quadrennial period because no reservation had been made to that effect, while it was held in the *Eastern Railroad* case that the reduction would apply during the quadrennial period because such reservation had been made by inserting the words "unless otherwise ordered," and no protest to the reduction was made. In this case no issue was raised over the adequacy of the compensation, and Mr. Justice Harlan says in the opinion that the decision is not inconsistent with the decision in the *Northwestern* case. The language in one paragraph is as follows:

> "We do not mean that the Railroad Company was bound to continue the carrying of the mails, if subsequent changes in the rates were unreasonable, or did not meet with its assent. On the contrary, it was at liberty, when the 5 per cent reduction was made, to discontinue their transportation on its cars."

This language as applying solely to compensation and not to service is, however, fully explained by the last sentence of the opinion, where, in referring to the *Northwestern* case, Mr. Justice Harlan says:

> "That case differs from the present one in the important particular, that in the former the company bound itself to carry the mails during a certain period, and consequently, its acceptance, from time to time, during that period, of less than it was en-

titled to demand did not prejudice its rights to claim what was legally due under its contract; whereas, in the present case, the company could have declined to accede to the readjustment of rates when they were made."

It is thus clear that the company was free to decline "to accede to the readjustment of rates," but was not free to refuse to perform the service.

These four cases, two land grant and two non-land grant, are in complete harmony, the same rule is applied, and all decide that carrying the mails is compulsory, when this service is called for under the law by the Postmaster General. Whether a railroad is a land grant or a non-land grant company becomes immaterial, therefore, so far as the obligation to carry the mails is concerned. Both classes of railroads are performing similar governmental functions; both are required to carry the mails; and both may protest as to compensation. When the Postmaster General sends out his distance circular to a railroad company in operation, calling upon it to fill out the circular and return it to him preparatory to carrying the mails, he has demanded performance of a governmental function, and this can not be refused, but the railroad company may protect itself by filing a protest to the compensation offered and instituting an action in the proper court. In performing this governmental function in carrying the mails there is no difference between a land grant and a non-land grant railroad. The obligation rests upon both alike.

Railroads became government agencies when they were made post roads by Congress, and were perform-

ing a governmental function when required by the Postmaster General to carry the mails. He may exercise a discretion as to routes and kinds of service. The powers granted in Section 3965 can not, however, be defeated by a refusal of the railroad company to perform the service.

A railroad company can not refuse to carry the mails over the non-land grant part of its system, when it is obliged by statute and its charter to carry the mails over the land grant part of the same system. A railroad company is not required to perform a governmental function over one part of its line and not over another.

Mr. Justice Lamar did not hold in the *Santa Fe* case that the company was performing a governmental service only over a part of its line.

Performance of governmental functions does not begin and end at land grant boundaries. The Government of the United States is not so limited in its authority, which is effective throughout its territory.

There can be no option in the performance of a governmental function. If option should be granted, function would cease.

In the case of *The Chicago, Milwaukee & St. Paul R. R. Co. v. The United States,* 198 U. S., 385, Mr. Justice McKenna says:

> "A contract may not be forced upon a railway. It may accept, however, and become bound by the action of the Post Office Department. Eastern Railroad v. United States, 129 U. S., 391. The record does not show any protest against the order of December 3."

The decisions in all these cases are in harmony, although some language in some of the opinions may at first be thought to be inconsistent. But it is not to be so construed, and the words in the last paragraph by Mr. Justice Lamar in the *Santa Fe* case, 225, U. S., 650, should be given their full meaning and effect where he says:

> "It may have been impracticable to furnish long cars one way and short ones the other. But there was in that fact no hardship imposed by law. The company could have protected itself against onerous terms, or inadequate compensation, by refusing to supply the facilities on the conditions named by the Department."

The acts of Congress, and the Rules of the Post Office Department promulgated thereunder, never have provided for a written contract between the Postmaster General and the railroad carrier for the transportation of the mails. It is a matter of common knowledge to this court, the Postmaster General, and to railroad carriers in carrying the mails, that under the provisions of Sec. 4002, Revised Statutes, Sec. 1317 of the Postal Laws and Regulations, 1913, the Postmaster General sends out distance circulars preceding each quadrennial period, which distance circulars are in all cases alike, a copy of which for the period beginning July 1, 1913, is found as Exhibit B, and a similar distance circular was set out in the findings of fact in the Divisor cases heretofore decided by this court, and in the findings of fact in the *Delaware, Lackawanna & Western* case, 51

Ct. Cl., 426. These distance circulars are shown to be mere orders of the Post Office Department, and not written contracts at all; they are exactly what the title indicates.

The railroad company is required to furnish the Postmaster General the distance over which the mails are to be transported on legal routes, which information is peculiarly within the knowledge of the railroad company. This is the only fact the railroad company, under the distance circular, is required to furnish, and every other provision set out in the distance circulars is either named in the statute itself, or in the Rules and Regulations of the Post Office Department. The distance circulars do not indicate any contractual relation between the Post Office Department and the railroad companies.

The subsequent orders of the Postmaster General, Exhibit C, naming the amounts of compensation, are merely carrying out the accounting part of the statute above referred to. The acknowledgement of the obligation on the part of the railroad carrier in the transportation of the mails, therefore, by the filing of the distance circular creates no new or primary obligation whatever. The subsequent orders of the Postmaster General in naming the amounts of compensation, are merely a further carrying out of the provision of the law.

In this discussion no criticism is made whatever because in the several decisions bearing upon this question reference has at different times been made to these statutory obligations and the compensation therefor as having been called "contracts." In no case was the issue before the courts as to whether these statutory obligations and the compensation authorized by law made a

"contract" in the ordinary legal acceptation of that term.

In "An Act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1917," approved July 28, 1916, Congress included the two following provisions:

> "All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith."
>
> "That it shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster so to do, and for such offense shall be fined $1,000. Each day of refusal shall constitute a separate offense."

These provisions created no new obligations; courts in a civil action would have enforced the carrying of the mails; in doing so they would have fixed the compensation therefor; these paragraphs had the effect of declaring only in more direct terms the obligation created many years ago, of making refusal a criminal offense, of limiting the fine which might have been imposed, and declaring definitely that "each day of refusal shall constitute a separate offense."

From these constitutional provisions, statutes, and decisions, it is clear that all the lines of the claimant, impressed with their common carrier obligations, have been made post routes; that the Postmaster General sent out the distance circulars at the beginning of each

quadrennial period, a copy of which is found as Exhibit B; that the claimant filled out the distance circular and returned the same to the Second Assistant Postmaster General as directed in the first section, and as a part thereof included the protests found in Exhibits B and D of the petition; that thereafter the Postmaster with these protests before him each day furnished the claimant with the mails to be transported over its lines in accordance with his orders and over the claimant's protest; and with its announcement acknowledged; that thereunder and thereby the private property of the claimant was taken to that extent for public use; the allegations in the petition that the compensation received was unreasonable, unjust, unremunerative, confiscatory, and unconstitutional are admitted by the demurrer to be true; and the value of this private property so taken for public use should be fixed by due process of law.

That this claimant can not be deprived of its "property without due process of law" will be admitted. An attempt to fix an unjust compensation would be unconstitutional and void. The compensation for the use of private property taken for carrying the mails must therefore be fixed by courts of competent jurisdiction in regular proceedings instituted for that purpose.

The fallacy of the defendants' argument on this branch of the case in the court below may be found in two sentences of their brief filed in that court;

> "The claimant was not obliged under the law to make such contracts, or to perform the service without a contract. It had the option of refusing to perform the service at the compensation fixed by the Postmaster General."

The first sentence is denied. The second, with the last eight words attached, is admitted. The defendants have confused the statutory requirement for the Postmaster General to have the mails carried over post routes with the right of the railroad company to refuse the compensation offered. The first may not be refused, but to the second a refusal is valid. This is just what was held by Mr. Justice Harlan in the *Eastern Railroad* case, and by Mr. Justice Lamar in the *Santa Fe* case, as quoted herein on pages 20 and 23, respectively. It has no "option of refusing to perform the service" when disconnected from compensation; but the option spoken of which really exists applies solely to "the compensation fixed by the Postmaster General."

Power on the part of the Postmaster General to have the mails carried destroys the option as to performance, while the right on the part of the railroad company to protest as to pay prohibits the power of the Postmaster General to fix a final compensation which is unjust and unconstitutional.

It is alleged in the petition that the total compensation as received is inadequate, unremunerative, confiscatory and unconstitutional. Upon this point the allegations of the petition are full and complete, and being admitted to be true by the demurrer set out in the most general terms, this portion of the petition sets out a good cause of action.

Point Three.—True Weight.

The Claimant is entitled each year to pay for the amount of mail carried that year.

I.

Annual Weight of Mail.

"The pay per mile per annum" mentioned in the statute can not be changed by the Postmaster General into "pay per mile per future quadrennial period."

That portion of the statute and the amendment thereto involved in ascertaining "an average weight of mails per day" upon which the pay should be computed for each year, set out in Exhibit A, is as follows:

> "Second, That the pay per mile per annum shall not exceed the following rates namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars (now $42.75); * * * the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty (now ninety) at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

It is alleged that the Postmaster General weighed the mails in the New England States in the fall of 1908, and that the middle or average date of the weighing

period of 105 days was October 18, and weighed them again in the fall of 1912, and that the middle or average date of this period was October 27; and then he took the average weights so ascertained as the total weight carried each year of the succeeding quadriennial period.

It is thus seen that the "average weight of mails per day" named in the statute was never ascertained during any year as a basis for the compensation for that year.

Neither was the weight of mail ever ascertained during any quadrennial period as a basis for the compensation for that quadrennial period.

From these dates it is seen that the weights ascertained eight months before each quadrennial period began were taken as the weights for each of the fiscal years of the subsequent period.

The reason for thus substituting the weights taken at one time for the basis of compensation of subsequent years was frankly stated by the Second Assistant Postmaster General in his letter of June 29, 1909, page 16 of the record, when he says:

> "In this connection I have to remind you that for two years past there has been a proposal before Congress to specifically authorize annual weighings, and each time Congress has declined the proposition upon the ground that it would result in paying the railroad companies more money than would be paid upon the quadrennial weighings."

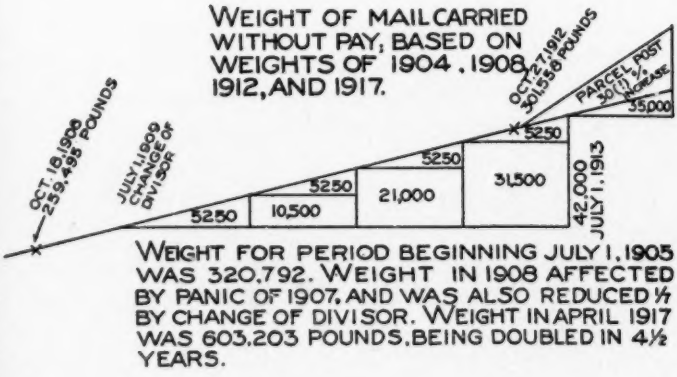
This method of using the weight for each fiscal year which had been ascertained eight months before the quadrennial period began was grossly unjust to the claimant, as is seen by the weights set out on page 3 of the record, where it is shown that the claimant was

carrying daily 42,063 pounds of mail more at the end of the quadrennial period than at the beginning. If these figures had been reversed; if the annual decrease had been as great as the annual increase is shown to have been, this method of assuming weights of past years as the basis for future compensation, would not have been allowed to exist beyond the first year, and it ought not to have been so; it would not have been legal; it would have created a national scandal to pay a railroad company for a service it did not perform. It is not commendable to take service without pay, and short weights are not to be defended even when systematically enforced. When the mails were weighed in 1912 and 301,558 pounds secured, it is perfectly plain that the law was not followed in fixing the compensation on 259,495 pounds.

By these same figures set out on page 3 of the record it is seen that during the fiscal year beginning July 1, 1912, the claimant was carrying the "whole length an average weight of mails per day" of 301,558 pounds, yet it was paid for only 259,495 pounds, weighed as of October 18, 1908, four years before. The Postmaster General under the law should have paid for the other 42,063 pounds which he ascertained on October 27, 1912, were a part of the "average weight of mails per day" then being carried. These figures further show that during the quadrennial period ended June 30, 1913, not less than 96,000 pounds per day, and during the six fiscal years not less than 144,000 per day, omitting the two-thirds of the year before the period began, were carried without any compensation whatever. Thus dur-

ing these six fiscal years more than 8 per cent of the mail was carried without pay.

A diagram is here inserted based upon the figures given in the petition drawn on a 4 per cent basis of annual increase and showing also the increase by parcel post, which was only partly paid for, the checks in the upper line indicating the weighing periods. This diagram illustrates the enormous loss sustained in constantly carrying the accumulating normal increase of mail from year to year and period to period without compensation.



WEIGHT FOR PERIOD BEGINNING JULY 1, 1905 WAS 320,792. WEIGHT IN 1908 AFFECTED BY PANIC OF 1907, AND WAS ALSO REDUCED ⅓ BY CHANGE OF DIVISOR. WEIGHT IN APRIL 1917 WAS 603,203 POUNDS, BEING DOUBLED IN 4½ YEARS.

By refusing to ascertain the true weight of mail carried each year as a basis for the compensation for that year, either by weighing the mails that year, or by averaging the weights taken at the beginning and the end of each period, which might have easily and accurately been done, the Postmaster General has simply failed to follow the law, which specifically requires the pay for each year to be based upon the weight of mail carried that year. "The pay per mile per annum" can be gotten in no other way. The statute is perfectly plain and works no hardship on the Post Office Department, and when followed gives only the statutory compensation for the services annually performed. Certainly an averaging of the weights between the two weighings is what was intended when it was provided that the weights should be taken "not less frequently than once in every four years." Congress did not create any arbitrary quadrennial period, the following of which would produce such an enormous loss.

Under the statute above quoted, requiring the Postmaster General to weigh the mails "not less frequently than once in every four years," the weights could of course be taken annually, and these annual weights would necessarily be the basis for the pay "per mile per annum." It is not following the law to weigh the mails before the quadrennial period begins, extend the weight into four years, divide it into four equal parts for the purpose of payment, and thus get a different and smaller amount as a basis than would be secured by an annual weighing. This is not giving "pay per mile per annum"; it is simply giving one-quarter of an incorrect quadrennial amount. There can be but one correct

amount for each year, and that is the amount actually carried. There is no more legal right for disregarding "per annum" than for disregarding "per mile," and the Postmaster General has no right to decrease the compensation by disregarding the law. The Postmaster General has substituted "per quadrennial period," in the place of "per annum," and thus fixes the pay "per quadrennial period" established for weighing instead of "per annum" established for pay. If the weighing is done quadrenially still the pay must be fixed annually. He has confused the right to weigh quadrennially with the statutory requirement to fix the pay annually upon the average annual weights. This statute has been ignored because following it "would result in paying the railroad companies more money than would be paid upon the quadrennial weighings." The correct weights "per annum" can be ascertained within the strict letter of the law by an annual weighing within each year, or by averaging the weights taken at the beginning and at the end of the period, but giving each year one-quarter of the total amount for the quadrennial period is not complying either with the letter or spirit of the law. "Per annum" means that the pay for one year can not be based on the amount of mail carried some other and different year, not even in the same weighing period. The claimant under this statute is, therefore, entitled each year to pay for the amount of mail carried that year.

The error of the Postmaster General lay in his connecting "the pay per mile per annum" too closely with an invariable and departmentally self-imposed quadrennial weighing. The law speaks only of actual weighings "not less frequently than once in every four years". The

true weight each year was not so far off but that it might easily have been found. The court below can by averages find the amount of mail carried without compensation, and can render a just and fair judgment therefor.

The claimant has not by performance waived any right to demand pay for the true weight of mail carried each year. The statute cannot be waived. This point is covered in the case of the *Union Pacific R. R. v. United States*, 104 U. S. 686; 26 L., 885, where Mr. Justice Matthews says,

> "The service can not be treated as voluntary, in the sense of submission to exactions, believed to be illegal, so as to justify an implied agreement to accept the compensation allowed; for, according to the terms of the obligation, which it did recognize and and now seeks to enforce, it had no option to refuse performance when required. But it might perform, rejecting illegal conditions attached to the requirements and save all its rights. This it did."

II.

Carrying of Parcel Post.

From and after January 1, 1913, the claimant carried each day an increased amount of mail furnished as parcel post packages, for which increased compensation can be recovered.

The Parcel Post law of August 24, 1912, took effect January 1, 1913, and by this means the amount of mail carried by the claimant was vastly increased. On the 4th of March, 1913, Congress provided that an increase of pay should be given, not exceeding 5 per cent per annum. The full amount of this 5 per cent was not given the claimant, according to the allegations in the petition,

and this is held to be a violation of the statute in the case recently decided by the court below (*A. T. & S. Fe Ry. Co. v. U. S.*, 52 Ct. Cl., 338). This in itself furnishes a good cause of action as set out in the petition, although the allegation there contained is that the 5 per cent is not adequate compensation and a greater amount is demanded.

Nothing illustrates the fallacy of engrafting a quadrennial fixing of pay on to the quadrennial weighing of the mails better than including parcel post packages as claimed by the defendants below.

The mails on the claimant's lines were weighed in the fall of 1912, as of October 27th, and this weight taken for the quadrennial period beginning July 1, 1913. In the meantime the Parcel Post had been established, taking effect January 1, 1913, but no new weighing was had, and this new and additional amount of mail was carried on the old weights.

It was claimed by the defendants below that the Postmaster General had the right to impose this new and different kind of commodities formerly carried as freight or express on the mails as weighed as of October 18, 1908, and October 27, 1912, without additional compensation, or with only the small part of the compensation granted by the act of March 4, 1913, which he chose to give. As the court below has decided that the whole amount named in the act of March 4, 1913, should be given, much more then under the allegations of the petition can the claimant receive an additional amount when it has protected itself by the protest on page 9 of the record when it said:

"The Company named below agrees to accept and perform mail service upon the conditions now prescribed by law and the existing regulations of the department, but only because its failure to perform this service would result in an intolerable hardship to the territory which it serves; otherwise, the company would decline to perform such service because of the burden of loss, admitted by the Post Office Department, which such service compels it to bear.

"It protests that the pay for such service is inadequate and unreasonably low, and that while according to judicial decision it is not by law compelled to perform the service, nevertheless, it is in fact so compelled. It reserves the right to claim and recover a reasonable compensation for any additional service which it may agree to perform."

Under this protest the claimant did not elect to perform this service, with freight and express added to the mails, at the old weights and at the compensation named. This is just what it refused to do, and if the Postmaster General did not intend to weigh the mails again with the parcel post packages added, or pay an adequate additional amount, he should not have delivered these packages for transportation.

It can not be held, as argued by the defendants below that the addition of parcel post packages can be added after July 1, 1913, to the amount of mail carried by claimant, as acertained by a weighing in the fall of 1912. This new matter taken from freight and express can not be added by virtue of the words "subject to future orders," as found in the notice of adjustment dated November 13, 1913, so as to bring it within the decision in the *Eastern*

Railroad case, 129 U. S., 391. These words were no part of the distance circular set out in Exhibit B, but appear only in the notice of adjustment of pay set out in Exhibit C. If the Postmaster General had weighed the mails annually, or averaged the weights as he should have done, then any amount added during a later part of the year might be overlooked because of the impracticability of weighing the mails every day of every month.

But to add the whole of the parcel post for the quadrennial period to the weight taken eight months before the period began, and then claim that it can be upheld without giving compensation, is too unjust, unreasonable and unfair to commend it to judicial construction.

III.

Side and Terminal Service.

Under the Rules and Regulations of the Post Office Department, the Postmaster General has required the claimant to gather and deliver mails at intermediate stations off from and beyond the right of way and at a distance not exceeding 80 rods. This is not authorized by law, and the claimant is entitled to recover the value of this service.

During the period named in the petition the claimant has been required by the order of the Postmaster General to gather and deliver mails at intermediate post offices when located not more than 80 rods from a station at which the company has an agent, and proper compensation should be paid therefor. This service is not included in that for which Congress attempted to fix compensation. A railroad post route is not half a mile wide.

It can not be made so by any order of the Postmaster General. This allegation in the petition also sets out a just complaint, and adds another point in the illegal construction of the law.

For the reasons herein set forth it is submitted that each count of the petition contains a good cause of action, and the judgment of the court below should be reversed.

Respectfully submitted,

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Attorney for Appellant.

EDWARD G. BUCKLAND,
ARTHUR P. RUSSELL,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 374

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, *Appellant*,
vs.
THE UNITED STATES.

REPLY BRIEF FOR APPELLANT.

S. S. ASHBAUGH,
Attorney for Appellant.

EDWARD G. BUCKLAND,
ARTHUR P. RUSSELL,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 396.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, *Appellant*,

vs.

THE UNITED STATES.

REPLY BRIEF FOR APPELLANT.

POINTS CONSIDERED.

Counsel for the United States in his brief has considered two points only, but in neither of these can his statement be accepted as correct.

First: Counsel says that "The Appellant voluntarily performed the service," and has quoted parts of the record in an attempt to sustain this position.

On this point counsel overlooks the distinction between performing the service imposed by law when demanded by the Postmaster General, and accepting the compensation named in the statute as full pay for the service. This dis-

tinction was clearly pointed out in our former brief, and has been maintained by the decisions there cited and somewhat fully quoted under Point Two—Fair Pay. Pages 11 to 27.

While it may be true that no court has ever been called upon to issue a writ of mandamus to compel a railroad company to perform the service demanded by the Postmaster General, yet the statutes quoted make that service obligatory when the mails are tendered for transportation, and there is no doubt that a court would compel such service to be performed for a reasonble compensation.

It is clear from the record that from July 1, 1909, to July 1, 1913, the appellant carried the mails with notice to the Postmaster General that it would *claim* that the pay was inadequate, and that it would endeavor to recover a reasonable compensation. (Record, pages 32 and 33.)

It appears equally clear that the Department assented to the arrangement for it is said on page 31:

> "The Department's position has been fully stated, from which it is impossible, as I view it, to recede. On the other hand, your position has also been stated. Under these circumstances I see no reason why you should not file the certified distance circulars, with the agreement clause signed, with the exceptions expressed in your correspondence. They would be received by the Department and pay orders issued, subject upon its part to all of the conditions and statements set forth in letters of the Postmaster General and myself. It seems to me that this would accomplish all that can be accomplished by your present course and permit of the issuance of the usual pay orders at an early date."

Under this agreement "with the exceptions expressed in your correspondence," the *claims* of the Department are then stated on page 35, but these *claims* did not make any differ-

ent agreement or understanding whatever, and were as follows:

> (1) That the company will be subject as in the past to all the postal laws and regulations, etc.
>
> (2) That for the service no greater compensation can be paid than that provided by the statute and regulations and fixed by the orders of the Postmaster General, etc.
>
> (3) That the Department can not recognize any relations with the company which will give color to the claim that the services performed under the postal regulations are separate from those for which Congress has fixed compensation, etc.

As stated by the Department these are merely the *claims* it will make, when the *claims* of the appellant were clearly stated in the protest of November 3, 1909, where it is said (Record, page 33):

> "This agreement and acceptance is upon the further condition that said company shall not thereby be deemed to have admitted as valid any of the claims, contentions or statements of Postmaster General or the Second Assistant Postmaster General made in answer or reply to said letters, and upon the further condition that the receipt of any pay order or other form of order, or the acceptance of pay for the performance of said service shall not be construed to modify or waive the terms upon which this service is to be performed as herein set forth, but that this Company shall be deemed to accept such pay only as part payment on account of such performance in case it shall hereafter be determined by the Court of Claims or any other proper tribunal or authority that said pay is inadequate or unreasonably low."

The agreement referred to is the one found in the letter of August 24, 1909, on page 31 of the record and quoted above.

From these parts of the record it is clear that the argument of counsel in no wise overthrows the argument in our former brief on Point One—Protest, pages 5 to 11, and that his argument in regard to performing service in no wise refutes the protest as to the compensation being accepted as payment in full. The distinct agreement on page 31 of the record shows the contrary.

The case of the *Delaware, Lackawanna and Western*, decided on April 14, 1919, seems to be conclusive of the law on this point.

The protests and refusals as to the compensation above set out for the quadrennial period beginning July 1, 1909, were repeated and fully preserved in the objections filed as a part of the distance circular for the period beginning July 1, 1913, as shown by Exhibit B, on page 9 of the record.

The argument of counsel, therefore, sets up no defense in law to this branch of the appellant's case.

Second: The argument of counsel on the second point does not reach the position set out as Point Three—True Weight, on pages 28 to 38 of the former brief.

It is there charged that the Postmaster General did not follow the law in fixing "the pay per mile per annum," not that he did not follow his own administrative custom.

If the Postmaster General did not follow the law, age will not cure the violation.

The complaint is distinct that the administration of the Postmaster General in not fixing "the pay per mile per annum" was not in accordance with the statute, and under this charge long observance will be no defence. He might weigh the mails annually, biennially, or quadrennially, but the statute requires that the pay must be fixed "per annum." Systematically paying for only a part of the mail carried

each year, 259,495 pounds out of 301,558 in 1912, was not following the law.

This is fully argued in our former brief, and counsel has set up no defense to this branch of the appellant's action.

Respectfully submitted,

S. S. ASHBAUGH,
Attorney for Appellant.

EDWARD G. BUCKLAND,
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Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, appellant,
v.
THE UNITED STATES OF AMERICA. } No. 396.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an action brought to recover additional compensation for carrying the mails during the period beginning July 1, 1908, and ending June 30, 1914, in excess of the amounts paid to the carrier for that service. The petition, as amended, is in two counts. In the first, it is alleged that the carrier performed the service under certain implied contracts by which it was to receive certain amounts prescribed by the statute but that the Postmaster General departed from the provisions of the statute in that he computed the amounts due the petitioner upon the basis of quadrennial weighings made at the beginning of each four-year period instead of making annual weighings or averaging the weights found at the beginning and the end of the four-year periods. It is further alleged that since 1913 the burden upon the carrier

was increased by the establishment of the parcel-post service and that the additional compensation paid therefor was inadequate. Under this count $361,057.29 is claimed.

In the second count complaint is made of the reduction in compensation by the act of 1907, of certain demands made by the Postmaster General with respect to details of the service and to the burden of the parcel post referred to in count one. Reference is then made to certain factors which have increased the cost of service. The count concludes with the claim that by reason of the inadequacy of the compensation paid to the carrier there has been a taking of petitioner's property for public use without just compensation. The sum of $4,424,873.60 is claimed under this count.

A demurrer to the petition was sustained by the Court of Claims (R. 41). The Court's opinion appears in the record, pp. 36–41. This appeal followed.

THE FACTS.

The statute which regulated railway mail pay during the years in question was R. S. 4002. As amended, its provisions, so far as here material, are as follows:

> Second. That the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of 200 pounds $42.75 * * * the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of

successive working days, not less than ninety, at such times, after June thirtieth nineteen hundred and five, [*originally eighteen hundred seventy-three*] and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct.

It is undisputed that the Postmaster General determined the amount of compensation which he actually paid to the appellant by the method of weighing and computation which, under the provisions of this statute, has been used in all cases by the Post Office Department at least since 1873, a period of over forty years.

The customary quadrennial periods adopted in the case of the petitioner expired in 1909 and 1913. In the spring of 1909 the usual distance circular was mailed to the petitioner for filling out. A correspondence ensued, which appears in the record (pp. 11–35), relating to the terms upon which petitioner should carry the mails for the quadrennial period from 1909 to 1913. The company stated its opinion that the rates allowed for the carrying of the railway mail were inadequate. To the reiteration of these suggestions in successive letters the Post Office Department uniformly replied that it could under no circumstance enter any relation with the carrier under which it would be obligated in any manner to pay any compensation in excess of the amounts fixed by the statute. (R. 18, 25, 27, 30, 31, 35.)

The distance circular was returned by petitioner bearing a caveat to the effect that its signing should not estop it from pursuing any remedy it would have otherwise had and that such signing should not be an admission of the validity of the position of the Post Office Department (R. 32,33). The service had then been continuing for some time (R. 31). Receipt of the distance circular was acknowledged in a letter which is not only the final word of the Post Office Department but which closed the correspondence. It contains this language (R. 35):

> "In regard to the statements contained in the printed form of agreement and acceptance, and in reply thereto, *you are advised that*, notwithstanding the same, *the Post Office Department will not enter into any contract with* the New York, New Haven and Hartford Railroad Company *by which it may be excepted from the operation of any postal law or regulation* and *that* in the performance of the service in the past and in the future, the Department claims that the company will be subject as in the past, to all the postal laws and regulations which are now or may become applicable during such service; *that for service no greater compensation can be paid than that provided by the statute and regulations* and fixed by the orders of the Postmaster General, *receipt of which is regarded by the Postmaster General as full payment for services rendered, and that the Department can not recognize any relations with the company which will give color to the claim that*

the services performed under the postal regulations are separate from those for which Congress has fixed compensation." [Italics mine.]

In this situation the mail continued to be offered for carriage and it was carried by the petitioner.

In the course of the correspondence, while the company had observed that its obligation to the community served by it was such that it could not refuse to carry the mail without censure from its patrons (R. 15), it had more than once pointed out that it had been declared by this Court that it was not bound to continue that service. (R. 20, 21, 28.)

In 1913, the petitioner was again tendered a distance circular for execution. It signed it, again with a protest, but the attention of the Court is especially directed to the form of that protest. (R. 9, 10.) It then said that it agreed:

> "to accept and perform mail service *upon the conditions now prescribed by law and the existing regulations of the department*" [italics mine];

but it stated that it did so because

> "a failure to perform this service would result in an intolerable hardship to the territory which it serves";

and added:

> "otherwise, the company *would decline to perform* such service because of the burden of loss, admitted by the Post Office Department, which such service compels it to bear.
>
> It protests that the pay for such service is inadequate and unreasonably low and that *while according to judicial decision it is not by*

> *law compelled to perform the service,* nevertheless, it is in fact so compelled. It reserves the right to claim and recover a reasonable compensation for any additional service which it may agree to perform." [Italics mine.]

It may be remarked that *Atchison, etc., Railway* v. *United States,* 225 U. S. 640, was decided in June, 1912.

THE CONTENTIONS OF THE PARTIES.

Despite the reiteration by the petitioner both in the correspondence of 1909 and in the return of the distance circular in 1913 of the position that it was not by law compelled to perform the service of carrying the mail, the company now rests its case principally upon the contention that, as a common carrier, it was so compelled. This compulsion it asserts as the reason why in carrying the mails, tendered to it with a flat and final statement of the Post Office Department that it would pay the amounts fixed by the statute and no more, it is not to be said to have earned those amounts and no more.

To this assertion the Government replies that the company was right in its first position, that it was not in fact under any compulsion to carry the mails ; and that any service which it rendered was entirely voluntary. It adds that whatever might have been said as a matter of reasoning *a priori,* the correctness of that position has long been settled by repeated decisions of this court which have established the rule under which the Post Office Department and the

Court of Claims have uniformly acted. And it says that since, therefore, the foundation of petitioner's argument thus falls, its case falls with it. If, as petitioner says, it did not make a contract with the Post Office Department to carry for a term of years at the prices offered, the most that the legal situation presents is that by the actual carriage a series of obligations arose from day to day to pay for the service performed what the department had said it would pay if the service was performed. These amounts have been paid and the obligation fully discharged. There remains, therefore, nothing upon which petitioner can found a suit.

The subsidiary contentions of petitioner relating to the reduction resulting from the act of 1907 and to the burden imposed by the establishment of the parcel post and the alleged inadequacy of the additional compensation paid by the Postmaster General in respect thereof appear to be foreclosed by the cases of *Delaware, etc., Railroad* v. *United States* and *United States* v. *Atchison, etc., Railway* decided by this court on April 14, 1919. No doubt for that reason they were not pressed at the argument. To the final contention respecting the manner in which the department determined average daily weights, the Government replies that the question is hardly an open one in view of the fact that for over forty years the Post Office Department consistently followed the construction of the statute adopted in this case, with the apparent acquiescence of the carriers, the Congress, and the courts.

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ARGUMENT.

This case is another of a long series which have arisen from the efforts of the railroad companies to secure increased compensation for carrying the mails and in which it has been sought by one argument or another to escape the limitations of the statute of 1873 and its amendments and the effect of the practice which grew up under it. It would serve no useful purpose to review or even to list all of these cases but it is interesting to notice that the point of compulsion here relied upon was involved in the following cases decided by this court: *Union Pacific Ry. Co.* v. *United States*, 104 U. S. 662, 665; *Eastern Railroad* v. *United States*, 129 U. S., 391; *Chicago, etc., Ry. Co.* v. *United States*, 198 U. S. 385, 389; *Atchison, etc., Ry. Co.* v. *United States*, 225 U. S. 640; *Delaware, etc., Railroad* v. *United States*, decided April 14, 1919.

Since the bringing of this suit, the Congress has put an end to the controversy, or at least given it, for the future, a new form by enacting the act of July 28, 1916 (39 Stat. 412, 429), by which it is provided that the railroads may be compelled to carry the mails, and by providing further for a method by which just compensation shall be determined. The fact of the passage of this statute is not without significance as showing reflexly the state of law before its enactment, although the legislation does not itself affect any issue here involved.

It is, however, clear both on reason and authority that the court below was right in sustaining the defendant's demurrer.

I.

THE APPELLANT VOLUNTARILY PERFORMED THE SERVICE.

It is upon the contention that the petitioner as a common carrier was compelled to perform the service which it rendered that the whole theory of its claim for what it says is the just value of its services rests. It has already been noticed that the petitioner itself did not make that contention in the correspondence which is annexed to its petition or in its return of the distance circular of 1913. On the contrary, in that return it specifically offered to perform the service suggested "upon the conditions now prescribed by law and the existing regulations of the department" and gave as its reason for so doing the hardship which would be imposed by any other course upon the territory which it served. It stated that otherwise it would decline to perform the service and added that according to judicial decision it was not by law compelled to perform the service. This was its last expression other than the bringing of this suit in which it asserts an inconsistent theory.

When petitioner stated that it was not by law compelled to perform the service suggested, it doubtless made that statement upon the authority of what was then a very recent decision of this court. In *Atchison, etc., Ry.* v. *United States*, 225

U. S. 640, Mr. Justice Lamar had used this unqualified language (650):

> The railroad, however, was not bound to furnish "half lines" nor to accept the terms named by the Postmaster General. *For Congress had not legislated so as to require compulsory service, at adequate compensation to be judicially determined or in a method provided by statute.* [Italics mine.]

That language directly meets the very claim here made. For the contention here is that the carrier was obliged to carry and therefore was entitled to adequate compensation judicially determined. Mr. Justice Lamar went on (650):

> And as the plaintiff's road * * * had not been aided by a land grant, *it was, under existing law, not obliged to carry the mails when tendered,* nor to supply R. P. O. cars when demanded. * * * The company could have protected itself against onerous terms, or inadequate compensation, by refusing to supply the facilities on the conditions named by the department. [Italics mine.]

And he had already said in terms (649) that in carrying the mail railroad companies were not hauling freight and were not common carriers with respect to that subject matter.

Reading this decision in the light of *Eastern Railroad* v. *United States*, 129 U. S. 391, upon which it is made in part to rest, and of *Delaware, etc., R. R.* v. *United States*, decided April 14, 1919, it is submitted that there can hardly be respectable

question as to the voluntary character of the service here rendered. As to the attempted distinction of these cases on the ground that what was held was merely that the carrier was not required to perform the service at the particular rate offered and that the decisions are not therefore necessarily inconsistent with petitioner's proposition that it was required to carry at reasonable rates, it is only necessary to point to what the court said.

It has just been noted that in the *Atchison case* the language was—

> It was, under existing law, not obliged to carry the mails when tendered.

In the *Eastern Railroad case*, which was decided in 1888, it was said in equally explicit words (129 U. S. 391, 395):

> We do not mean that the railroad company was bound to continue the carrying of the mails if subsequent changes in the rates were unreasonable or did not meet with its assent. On the contrary, it was at liberty, when the five per cent reduction was made, to discontinue their transportation on its cars.

It is respectfully submitted that it is too late in the day to argue that this court was wrong in these repeated statements of the legal situation, if indeed such an argument could be given the support of logical foundation.

The fact is that the petitioner knowing that the Post Office Department tendered the mails for carriage at the rates prescribed by the statute and on no

other basis, voluntarily carried them with the full knowledge of its right to refuse which it had expressed, because on the whole it believed it to be to its interest to perform the service upon the best terms it could get.

II.

THE PETITIONER THEREFORE HAS NO CAUSE OF ACTION.

It was admitted, virtually at least, at the argument, that the theory of a right to recover what is claimed to be just compensation for the service performed rested upon the supposed postulate that the service was performed under legal compulsion. Indeed the bill is drawn to recover for a "taking." (R. 7.) For the reasons and upon the authorities just referred to the foundation of petitioner's theory fails and its case falls with it. The situation is that mail was tendered to the carrier with the statement that it was at liberty to decline to carry it, but that if it did carry it compensation would be paid at the rate fixed by the statute, but at no higher rate. Under these conditions and despite certain earlier intimations to the contrary, the mail was carried.

Under these conditions there was no implied contract entitling the carrier to compensation in accordance with the reasonable value of the service performed (*Atchison, etc., R. R.* v. *United States*, 225 U. S. 640, at 649). Nor did the fact of protest, in so far as there was protest, change this situation.

(*Atchison case, supra,* at 648.)[1] The situation is the familiar one of unilateral contract where A says to B "If you will do thus and so, I will pay you so much" and B does what is stipulated and thereby becomes entitled to the amount promised but to no more. As was said in the *Atchison case, supra* (at p. 649), there was a relation under which rights and liabilities arose from day to day as the facilities were furnished by the one and used by the other. Here the Postmaster General has paid what he said he would pay. The rights of the appellant were fully satisfied and the obligation of the United States fully discharged.

And all this is apart from the suggestion thrown out in the *Atchison case, supra,* at page 649, that the situation here, because of the public interest involved, is different from what might be the situation in a suit between private parties. The consideration mentioned is, however, of importance.

It is hardly necessary to cite authority for the proposition that a promise will not be held to be implied in fact which is contrary to the expressed intention of the parties. Such is, of course, the law. (*Earle* v. *Coburn,* 130 Mass. 596; *Railway Company* v. *Gaffney,* 65 Ohio St. 104; *Municipal Water Works* v. *Fort Smith,* 216 Fed. 431.) Here, of course, the Postmaster General made it perfectly clear that he had no intention of paying more than the rates prescribed by the statute.

[1] The element of protest was also present in the *Lackawanna case,* decided Apr. 14, 1919. There also, as here, the department wrote to the carrier, stating that if it chose it might reserve any legal rights which it conceived itself to have and might resort to legal procedure for the determination thereof. (See the record in that case.)

And it is established by what has been said that there was no promise implied in law to pay more than those rates.[1]

What has been said disposes also of the contention that the petitioner was entitled to additional compensation because of the services incidental to transportation required of it by the postal regulations which had long been in force. The Postmaster General's agreement to pay specifically covered this service. (R. 25, 35.)

III.

THE AVERMENTS RELATING TO THE METHOD USED FOR DETERMINING AVERAGE DAILY WEIGHTS DO NOT STATE A CAUSE OF ACTION.

Even if the language of Revised Statutes section 4002 fairly admits of a construction other than that which the Post Office Department has put upon it for forty years, it is too late to insist that a different construction is required. As a matter of fact the Congress in 1905 (act of Mar. 3, 1905, 33 Stat. 1082, 1088)

[1] In *Shaw* v. *Armstrong* (88 Mich. 311), one party claimed that the whole work there in question was to have been done for $300; the other, that $500 was agreed upon. At the end of the first month the defendant tendered the plaintiff a check at the rate of $300. The plaintiff protested that the payment should have been at the rate of $500, but accepted the check on account and continued the work. The trial court instructed the jury that if both parties had acted in good faith, and as a result o their misunderstanding their minds had failed to meet, the law would imply a contract to pay what the services reasonably were worth. But it was held by the Supreme Court that once defendant had made it clear (e. g., by the first monthly payment) that he was permitting the work to go on on the idea that his liability was limited to $300 the plaintiff could not thereafter continue with the work and successfully contend that there was a promise implied in law to pay the reasonable value of the service.

altered the provisions of the statute by increasing from thirty to ninety the number of successive working days during which the mail should be weighed, but, with full knowledge of the established practice of the department with respect to the matter now before the Court, it made no change in the provisions of the statute here in question. Congress had never made appropriations for annual weighing, and the scheme of averaging had been suggested and disapproved by the Comptroller of the Treasury as contrary to law. (R. The question being merely one of the meaning of the statute, there is a plain case for the application of the familiar rule as to the acceptance of long-continued departmental construction, not itself plainly erroneous and impliedly sanctioned by the reenactment of the statute. (*New York, New Haven & Hartford Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 361, 401.)

CONCLUSION.

It results that the judgment of the Court of Claims was right and should be affirmed.

LaRue Brown,
Assistant Attorney General.

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NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 74. Argued May 2, 1919.—Decided December 8, 1919.

Semble, that under Rev. Stats., § 4002, as amended, the Postmaster General may fix the sums payable to a railroad company for transporting the mails upon the basis of weights taken immediately before the beginning of the four-year term of the contract, and that annual weighings are not required. P. 126.

A railroad company which knowingly contracts and receives on this basis less than it would have received on the basis of annual weighings has no implied contract right to be paid the difference by the United States. P. 127.

Prior to the Act of July 28, 1916, c. 261, 39 Stat. 429, a non-land-grant railroad was not required to carry the mails; and when it voluntarily accepted and performed the service with knowledge of what the United States intended to pay, it cannot claim more upon the ground that its property was taken. *Id.*

53 Ct. Clms. 222, affirmed.

THE case is stated in the opinion.

Mr. Edward G. Buckland and *Mr. S. S. Ashbaugh*, with whom *Mr. Arthur P. Russell* was on the briefs, for appellant:

The claimant carried the mails during the period involved with the distinct declaration that it would not accept the amount of pay offered by the Postmaster General as full compensation for the services, which declaration in writing was acknowledged by the Postmaster General, the mails were then delivered for carriage, and the usual pay orders were issued thereon. That there was no agreement between the claimant and the Post Office Department as to the compensation for carrying the mails during the two quadrennial periods beginning July 1, 1909, and July 1, 1913, is clearly shown in the correspondence between the parties.

The offer of the claimant to perform the service must not be confused with its refusal to accept the compensation offered. This refusal placed the responsibility on the Postmaster General; if he delivered the mails for transportation they would be accepted only on the ground that the compensation was to be fixed by the courts.

When the Postmaster General sends out his distance circular to a railroad company in operation, calling upon it to fill out the circular and return it to him preparatory to carrying the mails, he has demanded performance of a governmental function, and this cannot be refused, but the railroad company may protect itself by filing a protest to the compensation offered and instituting an action in the proper court. In performing this governmental function in carrying the mails there is no difference between a land-grant and a non-land-grant railroad. The obligation rests upon both alike.

Railroads became government agencies when they were made post roads by Congress, and are performing a governmental function when required by the Postmaster General to carry the mails. He may exercise a discretion

as to routes and kinds of service. The powers granted in § 3965 cannot, however, be defeated by a refusal of the railroad company to perform the service. The Act of July 28, 1916, 39 Stat. 429, 431, created no new obligations.

It is not following the law to weigh the mails before the quadrennial period begins, extend the weight into four years, divide it into four equal parts for the purpose of payment, and thus get a different and smaller amount as a basis than would be secured by an annual weighing. This is not giving "pay per mile per annum"; it is simply giving one-quarter of an incorrect quadrennial amount.

The claimant has not by performance waived any right to demand pay for the true weight of mail carried each year. The statute cannot be waived. This point is covered in the case of the *Union Pacific R. R. Co.* v. *United States*, 104 U. S. 666.

From and after January 1, 1913, the claimant carried each day an increased amount of mail furnished as parcel post packages, for which increased compensation can be recovered. The Parcel Post Law of August 24, 1912, took effect January 1, 1913, and by this means the amount of mail carried by the claimant was vastly increased. On the 4th of March, 1913, Congress provided that an increase of pay should be given, not exceeding 5 per cent. per annum. The full amount of this 5 per cent. was not given the claimant, according to the allegations in the petition, and this is held to be a violation of the statute in the case recently decided by the court below. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 52 Ct. Clms. 338.

The mails on the claimant's lines were weighed in the fall of 1912, as of October 27th, and this weight taken for the quadrennial period beginning July 1, 1913. In the meantime the Parcel Post had been established, taking effect January 1, 1913, but no new weighing was had, and

this new and additional amount of mail was carried on the old weights.

Under the rules and regulations of the Post Office Department, the Postmaster General has required the claimant to gather and deliver mails at intermediate stations off from and beyond the right of way and at a distance not exceeding 80 rods. This is not authorized by law, and the claimant is entitled to recover the value of this service.

Mr. Assistant Attorney General Brown for the United States.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Appellant sued the United States to recover the difference between amounts received through the Post Office Department and what it claims should have been paid for its services in carrying the mails during a series of years, ending June 30, 1914. The demand is based upon implied contracts alleged to arise from the following circumstances. First.—Acceptance and transportation of the mails in reliance upon § 4002, Rev. Stats., as amended. This directs payment of specified sums per mile per annum according to weights; and the claim is that because the Post Office Department improperly construed and applied it, appellant received much less than it should have. Second.—Acceptance and transportation of the mails under orders and coercion of the Post Office Department, followed by failure to allow reasonable compensation therefor. Appellant claims its property was taken for public use and adequate compensation must be paid.

Concerning the challenged interpretation and application of § 4002, Rev. Stats., resulting in payments during each four-year term upon the basis of weights taken

immediately prior to the beginning of the same instead of annually, it suffices to say that the action taken accords with prior practice followed for many years; the letter of the statute permits it; the carrier submitted with full knowledge; and, impliedly at least, it was sanctioned by this court in *Delaware, Lackawanna & Western R. R. Co.* v. *United States*, 249 U. S. 385.

We think it must be treated as settled doctrine that prior to the Act of July 28, 1916, c. 261, 39 Stat. 412, 429,—with the exception of certain roads aided by land grants—railroads were not required by law to carry the mails. *Eastern R. R. Co.* v. *United States*, 129 U. S. 391, 394; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, 650; *Delaware, Lackawanna & Western R. R. Co.* v. *United States, supra.* And as appellant voluntarily accepted and performed the service with knowledge of what the United States intended to pay, it cannot now claim an implied contract for a greater sum. It may be that any railroad by failing to carry the mails would incur the hostility of those living along its lines and as a consequence suffer serious financial losses; but the fear of such results certainly does not amount to compulsion by the United States and cannot constitute the basis of a justiciable claim against them for taking property.

The Court of Claims (53 Ct. Clms. 222) dismissed the petition upon demurrer, and its judgment is

Affirmed.

Mr. Justice Brandeis dissents.